142-315

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1138.~~ 784 ~~463~~ 122

THE SUNFLOWER OIL COMPANY, APPELLANT,

vs.

BENJAMIN WILSON, RECEIVER OF THE MOBILE AND NORTHWESTERN RAILWAY COMPANY.

No. ~~1139.~~ 785 ~~464~~ 123

THE SUNFLOWER OIL COMPANY, APPELLANT,

vs.

BENJAMIN WILSON, RECEIVER OF THE MOBILE AND NORTHWESTERN RAILWAY COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

FILED SEPTEMBER 27, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1138.

THE SUNFLOWER OIL COMPANY, APPELLANT,

vs.

BENJAMIN WILSON, RECEIVER OF THE MOBILE AND NORTHWESTERN RAILWAY COMPANY.

No. 1139.

THE SUNFLOWER OIL COMPANY, APPELLANT,

vs.

BENJAMIN WILSON, RECEIVER OF THE MOBILE AND NORTHWESTERN RAILWAY COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 19, 1889.

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a United States District Court, Western Division of the Northern District of Mississippi.

Proceedings had in the district court of the United States for the Northern District of Mississippi, begun and held for its December term, A. D. 1887, at the court-house, in Oxford, Miss., on, to wit, the 7th day of January, 1888, and days prior thereto, in the following cause:

THE SUNFLOWER OIL COMPANY *et al.*

vs.

THE MOBILE AND NORTHWESTERN RAILROAD COMPANY *et al.*

Cutrer & Cutrer, for oil company; Holmes Cummins, Esq., E. Mayes, Esq., for R. R. company.

1 *O. Bill.*

In the District Court of the United States for the Northern District of Mississippi.

MOSES H. KATZENBERGER, WILLIAM KATZENBERGER, and ISADORE Katzenberger, Partners Doing Business under the Firm Name and Style of S. Katzenberger'- Sons, Citizens of the State of Tennessee and Residing in the City of Memphis, in that State, Complainants,

vs.

THE MOBILE AND NORTHWESTERN RAILROAD COMPANY, a Corporation Created by and Organized under an Act of the Legislature of the State of Mississippi and whose Railway, Principal Office, and Place of Business and *Situs* is in Coahoma County, Mississippi, within said District, and Mary Henry, Nellie Henry, John Henry, and Thomas Henry, who are Citizens of the State of Alabama and Residents of the City of Mobile, in that State, and The American Loan and Trust Company, a Corporation of the State of New York and a Citizen of that State, Resident of New York City, Defendants.

To the Honorable Robert A. Hill, judge, etc., presiding and holding said court, at Oxford, in and for said district:

The said M. H. Katzenberger, Wm. Katzenberger, and Isadore Katzenberger, complainants, etc., as above named, respectfully represent and show unto the court as follows:

That heretofore, about the — day of ——, A. D. 1870, the
2 Legislature of said State of Mississippi passed an act entitled "An act to incorporate the Mobile and Northwestern Railroad Company," which was duly approved and became a law, and that thereunder a corporation was organized and formed by the name and style of the Mobile & Northwestern Railroad Company, the defendant above, the object and purpose of such incorporation being the construction and operation of a line of railroad from a point on the Mississippi river, in Coahoma county, Mississippi, oppo-

site the city of Helena, Arkansas; thence in a southeast direction across the State of Mississippi in the direction of the city of Mobile, in the State of Alabama, to the line of the States of Alabama & Mississippi. Said act of incorporation will be found in the Session Acts or Laws of Mississippi of A. D. 1870, at pages 255 to 270, and to which reference is and will be made herein as may be needed without further setting out thereof unless required by defendants.

2nd. That said defendant, The Mobile and Northwestern Railroad Company, incorporated and organized as aforesaid, proceeded in the work of constructing the line of railroad contemplated by its said charter, and on and prior to the year A. D. 1877 built and equip-ed about thirty-one miles of road beginning at Dowd's Landing, now called Glendale, in Coahoma county, Mississippi, on the Mississippi river, opposite Helena, Arkansas, and running thence in a southeast course to Clarksdale, on the Sunflower river, in said Coahoma county, and acquired the right of way, built the road-bed, bridges, and trestles, laid the rails & tracks, with side tracks, depots,
3 stations, etc., etc., an incline into the Mississippi river for a ferry connection into Helena, acquired numerous cars of various kinds, engines, etc., etc., and since that date has been and now continues to use and operate its said railroad, receiving each day, week, month, and year large sums of money from the earnings of freight and passengers.

3d. That on or about the 17th day of March, A. D. 1877, for the purpose of raising money to build its said railroad, the defendant, The Mobile & Northwestern Railroad Company, executed and delivered a deed of trust or mortgage or conveyance of all its said line of railroad then being constructed, being about twenty-five miles in length and extending from said point, Glendale, on the Mississippi river, to Shepardsville or Jacksville, to one Thomas Henry, of said city of Mobile, Alabama, as trustee, to secure certain five hundred bonds, each of and for the sum of $500.00, and amounting in the aggregate to the sum of $250,000.00, issued or proposed to be issued by said Mobile and Northwestern Railroad Company, defendant herein. The said mortgage or trust deed conveyed "all and singular the said twenty-five miles of said railroad, now being and heretofore to be constructed, belonging to the party of the first part" (the said Mobile & Northwestern Railroad Company, defendant above), "extending from or near Dowd's Landing" (now called Glendale above), "on the Mississippi river, to a point in Coahoma county, in the State of Mississippi, to be called Jacksville, to-
4 gether with the track and roadway of said railroad and all the appurtenances thereto, and all siding, turnouts, bridges, culverts, water-ways, and rights of way and premises whatever, with the improvements thereon, now or hereafter belonging or appertaining to or provided or used or intended to be used for the purpose of or in connection with said line of said road, and all the depots and stations and depot grounds now or her-after belonging to said railroad, and all lands and real estate now held or hereafter provided, acquired, used or designed to be used for such depot grounds, and all the bridging, repair shops, car-houses, engine-

houses, freight-houses, and structures whatsoever used or designed to be used in connection with said railroad, and also all the present and future rolling stock and equipments of said railroad, and all the tools, machinery, rails, and materials of whatsoever kind now belonging or appertaining to be used, provided, or designed for the purpose of or which may hereafter be acquired, used, or provided for the purpose of said twenty-five miles of railroad, or the completion, maintenance, or operation thereof, and also all the franchises, rights, and privileges and immunities, tolls, profits, benefits, and advantages belonging or appertaining to or to arise from the said railroad, the appurtenances and the maintenance and operation thereof, together with all and singular the turnouts and appurtenances to the said railroad, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said Mobile & Northwestern Railroad Company
5 in and to the same," and covered and included both such parts or portions of said railroad as were then constructed as well as such as were then unfinished, and such portions as then had been acquired, as well as those that might be thereafter acquired.

4th. That, as contemplated when said mortgage or trust deed was executed and as provided for therein, said Mobile and Northwestern Railroad Company, the defendant, issued its several bonds of the tenor and amount in said mortgage or trust deed named, but whether the entire number provided for, to wit, five hundred, were issued complainants are not advised. Said bonds bear date the — day of March, A. D. 1877; are each for the sum of $500.00; bear interest from date at the rate of seven per cent. per annum, as evidenced by coupons or interest-bearing warrants, such interest being payable semi-annually, said bonds maturing the 1st day of January, A. D. 1897, and being payable in gold coin of like weight and fineness to that of the date of their issue.

5th. That said Mobile & Northwestern Railroad Company, the defendant, stipulated in said mortgage or trust deed that said properties and franchises were so conveyed to said Thomas Henry, as trustee, and in trust for the equal benefit and security of the holders of *of* said bonds and the interest warrants thereon without preference or priority of any one or more of said bonds over the other, and constituted same a first lien on said property and franchises; and, further, on the condition that in case default should be made in the payment of interest on any of said bonds and such interest should re-
6 main unpaid and in default for the space — three months after demand, or in case default should be made in the payment of the principal of any of said bonds, it should be the duty of said Thomas Henry, as trustee, to take possession of said road and to sell and dispose of said mortgaged premises and franchises, after advertisement for the space of four consecutive weeks in two newspapers published in the city of New York, one newspaper in the said city of Mobile, and one newspaper in the city of Jackson, Mississippi, at least three times a week, selling same at public auction to the highest bidder in either said city of Mobile or said city of Jackson, and further required that such sale should be made

within two months from the time such trustee might take possession of the mortgaged premises.

6th. That said Thomas Henry, the trustee named in said trust deed or mortgage, accepted said trust, but has since died in said city of Mobile, where he resided, leaving him surviving the defendant, Mary Henry, his widow, and the defendants, Nellie Henry, John Henry, and Thomas Henry, his only children and heirs-at-law and his sole devisees. Said decedent, Thomas Henry, died testate, and the defendant, Mary Henry, was duly appointed and has been duly qualified as his executrix; that no steps or proceedings of any kind have been taken for the purpose of appointing another trustee under said mortgage or trust deed in the room and stead of said Thomas Henry, deceased, and the position of trustee under said mortgage or trust deed is vacant.

7 7th. That complaina-ts are the owners and holders of two hundred and sixty-six (266) of said bonds issued by the defendant, The Mobile and Northwestern Railroad Company, and secured in and by the said mortgage or trust deed, and on each of which a large number of coupons or interest warrants are past due and unpaid as follows:

11 bonds, Nos. 339 to 369, both inclusive, with 14 due & unpaid coupons.

20 bonds, Nos. 379 to 398, both inclusive, with 14 due & unpaid coupons.

19 bonds, Nos. 400 to 418, both inclusive, with 14 due & unpaid coupons.

1 bond, No. 4, with 17 due & unpaid coupons.

1 " " 8, " 17 " " " "

8 bonds, Nos. 10 to 17, both inclusive, with 17 due & unpaid coupons.

15 bonds, Nos. 109 to 123, both inclusive, with 17 due & unpaid coupons.

12 bonds, Nos. 129 to 140, both inclusive, with 17 due & unpaid coupons.

8 bonds, Nos. 241 to 248, both inclusive, with 17 due & unpaid coupons.

1 bond, No. 300, with 17 due & unpaid coupons.

7 bonds, Nos. 18 to 24, both inclusive, with 12 due & unpaid coupons.

3 bonds, Nos. 65 to 67, both inclusive, with 12 due & unpaid coupons.

5 bonds, Nos. 124 to 128, both inclusive, with 12 due & unpaid coupons.

7 bonds, Nos. 494 to 500, both inclusive, with 9 due & unpaid coupons.

1 bond, No. 54, with 9 due & unpaid coupons.

1 " " 266, " 9 " " " "

1 " " 459, " 9 " " " "

1 " " 267, " 11 " " " "

3 bonds, Nos. 356 to 358, both inclusive, with 14 due & unpaid coupons.

1 bond, No. 399, with 14 due & unpaid coupons.
" " " 268, " 9 " " " "
10 bonds, Nos. 484 to 493, both inclusive, with 9 due & unpaid coupons.
8 bonds, Nos. 301 to 308, both inclusive, with 14 due & unpaid coupons.
12 bonds, Nos. 338 to 349, both inclusive, with 14 due & unpaid coupons.
9 bonds, Nos. 370 to 378, both inclusive, with 14 due & unpaid coupons.

166 bonds = 83,000.00; 2,324, @ 17½, $40,670.00.

19 bonds, Nos. 35 to 53, both inclusive, with 17 due & unpaid coupons.
61 bonds, Nos. 68 to 108, both inclusive, with 17 due & unpaid coupons.
40 bonds, Nos. 419 to 458, both inclusive, with 14 due & unpaid coupons.

266 bonds. 3,904 @ $17½ = 73,320.

8 Said passed due and unpaid coupons amount in principal to about the sum of 73,320.00 and, with the interest accrued thereon since their maturity, amount in principal & interest to about the sum of $92,000.00 or more now past due and unpaid from said defendant railroad company to the complainants.

8th. That the defendant, The Mobile & Northwestern Railroad Company, has been in default in the payment of interest on each and all of said bonds for four and a half years, and upon far the larger number for from seven to eight and a half years. Indeed, for several years past said defendant, The Mobile & Northwestern Railroad Company, has paid no interest at all on any of its said bonded debt, which in principal and interest amounts to about the sum of $40,000.00, and it is insolvent and unable to meet said interest. Indeed, its management retain and for several years past have retained all the income and earnings, tolls and profits, derived from the operation of said railroad, and have wholly failed to apply the same toward the payment of the interest on said bonds.

9th. That the defendant, The Mobile & Northwestern Railroad Company, stipulated and agreed in said mortgage or trust deed that any sale made thereunder shall be a perpetual bar, both in law and in equity, against it, and that upon any such sale the principal of all said bonds should thereupon become due and payable. A duly certified copy of said mortgage or trust deed, which was duly recorded in the proper office in Coahoma county, Mississippi (the chancery court clerk's office), is herewith filed, marked as an exhibit to this bill, and which is hereby made a part & parcel
9 of the bill to all intents & purposes, and said bonds and coupons so owned and held by complainants as aforesaid are here to the court shown, and will be produced and filed in such registry or depository as the court may designate and appoint.

10th. That the defendant, The Mobile & Northwestern Railroad

Company, has been in default as to the payment of interest on said bonds so owned and held by complainant- for more than three months after demand made, and now continues in such default, being indebted to complainant- in the sum of about $92,000.00 for such interest or coupons now and for more than three months past due and unpaid, & said company is insolvent.

11th. That said defendant, The Mobile & Northwestern Railroad Company, has property or rights of action, to wit, the monies derived from the operation of its said railroad and the rents, revenues, tolls, incomes, and earnings thereof, which it conceals and unjustly refuses to apply to the payment of its debts, and, as complainant- *is* informed, judgments for large sums of money have been rendered against it in the State courts in said Coahoma county, and which remain unpaid, such judgments being for various debts incurred by it in the operation of its road.

12. That complainant- files this bill in their own behalf, as well as and for and on behalf of any and all other holders of any of said bonds and coupons secured in said trust deed or mortgage who may come in and be made parties to this proceeding, that all may share equally in the proceeds of the sale of said mortgaged premises.

13th. That about the 19 day of September, 1883, the defendant, The Mobile and Northwestern Railroad Company,
10 executed another mortgage or trust deed to the defendant, The American Loan and Trust Company, as trustee, to secure a proposed issue of $800,000.00 of mortgage bonds. This mortgage or trust deed, however, was executed and recorded long subsequent to that above mentioned, executed by the same party to said Thomas Henry, as trustee, for the security of said bonds owned and held by complainant. Moreover, complainant- charges that none of said bonds intended to be secured by said mortgage or trust deed to the American Loan and Trust Company have been issued, and that the whole of said series are still in the hands of said Mobile and Northwestern Railroad Company. Said American Loan and Trust Company is a corporation organized under the laws of the State of New York and having its *situs* & place of business in the city of New York, in that State, where also is its post office. A copy of said mortgage or trust deed to said American Loan & Trust Company will be filed herein as evidence without other or further notice.

14th. That complainants are partners as bankers and brokers, and reside and do business in Memphis (called the taxing district of Shelby county), Tennessee, and their firm name is S. Katzenberger's Sons, complainants, and defendants are citizens and residents of different States, as set forth in the caption.

In consideration of the premises complainants respectfully pray as follows:

1st. That the parties named as such in the caption be made defendants by proper process and be required to appear and answer this bill, — for that end may copy and subpœna issue as to said Mobile and Northwestern Railroad Company, and publication
11 be made as to said Mary, Nellie, John, & Thomas Henry, who are non-residents of the State of Mississippi and are residents

of the State of Alabama, and whose post office, as complainants are informed and believe, is Mobile, Alabama, and as to said American Loan & Trust Company, whose post office is New York city, New York, *and* notice be otherwise served on them.

2d. That the defendant, The Mobile and Northwestern Railroad Company, be adjudged to owe and be indebted to complainants the amount due on said several unpaid and mature coupons as well as to such other holder- of such bonds and coupons as may come into and be made parties to this proceeding such amounts as may be due on the several unpaid and mature coupons held by them, respectively, and filed herein, and that said defendant be required to pay such monies, together with interest thereon from the dates of the maturities of said several coupons, respectively, into the registry of this court for the use and benefit of complainants and such other holders of bonds as have come into and been made parties hereto, etc., and for these purposes may proper orders, judgments, and decrees be entered.

3. That in case said defendant, The Mobile and Northwestern Railroad Company, fails to pay the amount of such past-due and upaid coupons, with interest, etc., as above prayed, *that* the whole principal of said bonds be decreed to be due, and that a sale of said mortgaged property and franchises be adjudged and decreed for the enforcement of the lien granted thereon in favor of the holders of said bonds and unpaid coupons; that such lien be adjudged and decreed in favor of complainant- and such other holders of
12 said bonds and coupons as may come in by proper petition and be made parties hereto, and such sale be decreed to be made by the clerk and master commissioner of this court for the satisfaction of such lien and the payment of the amount so adjudged to be due on said unpaid and overdue coupons as well as for the principal of said bonds themselves.

4th. That an attachment issue against the portion of railroad constructed by said Mobile and Northwestern Railroad Company extending beyond the point where the 25 miles so mortgaged and conveyed by said trust deed to said Thomas Henry ends, to wit, about six miles in length, and lying and being between station — and Clarksdale, in favor of complainants, and that it be adjudged and decreed that said entire road, road-bed, right of way, rails, ties, buildings, depots, etc., etc., and its franchises and properties, grounds and premises, cars, engines, etc., be sold as an entirety, and so much of the proceeds of such sale as may be derived from or properly derivable from said six miles of road not embraced in said mortgage be applied to complain-ts' said demands in preference to and to the exclusion of other holders of said bonds, such of the proceeds of such sale as may be derivable from said 25 miles of railroad and other mortgaged premises being decreed to be distributed *pro rata* among the holders of such bonds and coupons secured by said mortgage or trust deed inclusive of those owned by complainants.

5th. That a receiver be appointed by this court to take possession of said railroad and mortgaged premises, to use and operate and control and hold the same, under direction of this court, for the use

and benefit of complainants and such other holders of said
13 bonds and coupons as may come in and be made parties to this proceeding, and that the possession and control of said mortgaged premises be taken by this court out from the defendant, The Mobile and Northwestern Railroad Company, and be placed in the hands of such receiver.

6th. That at such sale or sales as may herein be decreed all equity or right of redemption or repurchase, if any, of said defendant, The Mobile and Northwestern Railroad Company, its successors and assigns, if any, as well as any and all other its and their estate in and to said railroad and mortgaged premises, be sold and be forever barred, and the right and title of any purchaser at such sale be made absolute, and that all right, title, claim, and interest, if any, of said American Loan and Trust Company in and to said premises and franchises so mortgaged, etc., or covered by said trust deed or mortgage to said Thomas Henry be also shut out and barred by the decree for the sale, etc., as above prayed for.

7th. That the legal title to said mortgaged premises, etc., vested in said Thomas Henry by said conveyancer to him and passed by his death to his said widow and children be divested out of them and be vested in such purchaser as may acquire said mortgaged premises, franchises, etc., at such sale as may be decreed herein.

Moreover, complainants pray for all such other, further, different, and general relief as in the nature of the premises they may be entitled to have, etc.; and as ever bound, etc.

HOLMES CUMMINS,
Sol. for Complainants.

14 The facts set forth in foregoing bill are full and true. The post office of defendants Mary, Nellie, John, and Thomas Henry and The American Loan & Trust Company are correctly stated, and that of the defendant The American Loan & Trust Company is New York city, State of New York.

HOLMES CUMMINS.

Sworn to and subscribed before me this 15th day of November, A. D. 1886.

G. R. HILL, *Clerk.*

Filed 15th Nov., 1886.

G. R. HILL, *Clerk.*

* * * * * * * *

Amendment to Prayer of Bill.

M. H. KATZENBERGER & Others
vs.
THE MOBILE & NORTHWESTERN RAILROAD COMPANY & Others.

In this cause the complainants, by their solicitor, move the court and asked leave to amend the prayer of their bill as follows:

That on the final hearing and the ascertainment of the amount

due complainants from defendant railroad company for account of past-due and unpaid coupons on the said several bonds owned and held by complainants they be allowed to show and the master commissioner be directed to ascertain and report also what, if any, of such interest coupons may have matured subsequent to the filing of the bill herein and then remaining unpaid, and that for the amount or amounts so reported and then found due a further recovery be granted complainants and a further order, judgment, and de-
15 cree be rendered for the payment thereof and for the sale of said mortgaged premises and franchises to enforce such payment as prayed for as to said interest coupons now already past due and unpaid; or, if such relief cannot be granted, that this cause be retained in this court, and if any surplus of the proceeds of the sale of said mortgaged premises and franchises remain after the payment of said interest coupons which were past due and unpaid at the filing of the bill herein or if any portion of said mortgaged premises remain unsold after the satisfaction of said past-due and unpaid coupons, *and* that such surplus proceeds or such remaining and unsold portion of said mortgaged premises and franchises be then subjected by proper order, judgment, or decree to the payment or to sale for the payment of such coupons as may have so matured since the filing of this bill and then remains unpaid; which being heard and considered by the court, it is ordered that said amendment be allowed and made by interlineation on the bill.

Filed & entered 6 December, 1886.

G. R. HILL, *Clerk.*

* * * * * * *

Decree Appointing Receiver.

United States District Court, Northern District of Mississippi, Western Division, *ss.*

M. H. KATZENBERGER *et al.*
vs.
MOBILE & NORTHWESTERN R. R. CO. *et al.*

16 And now, on this day, the court being sufficiently advised upon the motion of the complainant for the appointment of a receiver heretofore submitted to the court upon the bill, exhibits, answer, and affidavits filed by the said complainant, and the court having heard argument thereon, it is ordered and decreed by the court that Benjamin Wilson be appointed, upon giving security in the sum of ten thousand dollars, receiver herein to take possession of the money and assets, real and personal, road-bed, road, iron, ties, lands, right of way, mines, rolling stock, leases, franchises, and all other rights and property whatsoever of the said Mobile & Northwestern Railroad Company wherever the same may be found, with power to manage, control, and exercise all the franchises whatsoever of said railroad company, and with power to prosecute, defend, and continue all suits brought by or against the said railroad company,

whether before or hereafter commenced and whether in the name of said railroad company or otherwise; to defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said railroad company as he may be advised by counsel to be necessary & proper in the discharge of the duties of his office and for acquiring, securing, & protecting the assets, franchises, property, and rights of said railroad company.

And it is further ordered that the said defendants, The Mobile & Northwestern Railroad Company, or whoever may have possession thereof, assign, transfer, and deliver over to said receiver on
17 oath, under direction of George R. Hill, a master of this court, all the property, real & personal, wheresoever found, and all contracts for the purchase of land and all other equitable interests, things in action, and other effects which belonged to or were held in trust for said defendant railroad company or in which it had any beneficial interest, in the same condition as they were at the time of exhibiting said bill of complaint in this cause, except as far as necessarily changed in the management of said road, or in which it now has any such interest, and that said defendants deliver over in like manner all books, vouchers, and other evidences relating thereto.

And it is further ordered that said receiver have full power and authority to inquire after, receive, and take possession of all such property, debts, equitable interests, things in action, and other effects, and for that purpose to examine said defendant, its office-s, and such other *powers* as he may deem proper, on oath, before the said master, from time to time as he may deem necessary.

And it is further ordered that said receiver keep a full and accurate account of all his acts & doings as such receiver and report the same to this court from time to time as he may be hereafter directed by the order of this court, and in the meantime and until another order of this court to run, operate, & manage the road of said defendant railroad company and to manage and control all the property & affairs of said defendant railroad company; and the
18 said receiver is hereby authorized and empowered to employ such counsel and attorneys as he may deem necessary to manage in his behalf such suits & other affairs as have arisen or may arise and to advise such receiver in relation to the performance of his duties therein.

And it is further ordered, adjudged, & decreed that said receiver may use the money of the said defendant railroad company for any and all the purposes stated in the foregoing provisions.

Ordered, adjudged, & decreed this the 15th day of December, 1886.

R. A. HILL, *Judge.*

Filed & entered—Minutes No. 11, page- 171 & 172—December 15th, 1886.

G. R. HILL, *Clerk.*

Order to Receiver.

M. H. KATZENBERGER *et al.*
vs.
MOBILE & NORTHWESTERN R. R. CO.

It is ordered in this cause that the receiver in this cause pay, out of the earnings of said railroad, the amounts that may be due and owing to the employees of said R. R. Co. which may have accrued within the past six months.

It is further ordered that the receiver employ Thos. T. A. Lyon, the president of said railroad company, to aid him, so far as may be necessary, in the management of the business of said railroad and in promoting the interest of the income of said receivership and of the parties to this suit, and that he receive such compensation
19 therefor as to the court may seem right and proper.

It is further ordered that said receiver continue the contract and agreement heretofore existing between the said railroad company and any line of transportation with which said railroad is connected, and also any existing contract for the purchase or use of the rolling stock now used on said railroad, and also continue the employés of said road as may be necessary until, for sufficient cause shown, such contract should be annulled.

It is further ordered that until Benjamin Wilson, who has been this day appointed receiver of said railroad and the property connected with it, shall enter into bond, with security, as provided in the order and decree this day made appointing him such receiver, *that* said Thos. T. A. Lyon, the president of said R. R. company (and who was not appointed receiver solely for the reason that he is a party to this suit), remain in possession of said railroad and property and operate the same.

Ordered and decreed this December the 15th, 1886.

R. A. HILL, *Judge.*

Filed & ent. Dec. 15th, 1886.

G. R. HILL, *Clerk.*

19¼ W. H. KATZENBERGER & SON *et al.*
v.
MOBILE & NORTHWESTERN R. R. CO.

It appearing to the court that the cross-ties upon part of the track from Glendale to Lula are rotten and in bad condition; also that a portion of the bridges are greatly in need of repairs to secure safe transportation over said railroad—

It is therefore ordered that Ben. Wilson, the receiver, as soon as he reasonably can, procure such timbers and other materials as may be necessary to repair said track and bridges, and that he employ sufficient force to have such repairs made. Said receiver is authorized and empowered to have the rolling stock and machinery upon said

road repaired and put in such condition as may be necessary to the operation of said railroad.

It is further ordered that said receiver make any change in the contract heretofore existing between the said railroad company and others in relation to any of the rolling stock now in his possession and used in operating said road, and that if he shall find that he can dispense with the services of any of the employees on said railroad he may do so by paying them up all that is due them.

It is further ordered that, for the purpose of raising money to procure the necessary timbers and other materials and to pay for the labor in making the repairs hereinbefore mentioned, the receiver is authorized and empowered to issue receiver's certificates, not to exceed seven thousand five hundred dollars, bearing not exceeding ten per cent. per annum interest until paid, which receiver's
19½ certificates shall constitute a first lien upon said railroad track and the other property belonging to said railroad company and now in the possession of said receiver, and shall not be sold or otherwise disposed of at less than their face cash value, and shall not be issued only in payment of materials furnished or labor done, or be sold to raise money to pay for such materials and labor as the same may be furnished or labor performed.

It is further ordered that the receiver make and file his report with the clerk of this court of his actings and doings under this order.

It is further ordered that the receiver proceed, as soon as he well can, to obtain titles to the right of way and depot grounds not already obtained, and that in doing so he make any agreement as to price and payment that may be reasonable.

Ordered this January 3, 1887.

R. A. HILL, *Judge.*

Filed & entered January 3, 1887.

G. R. HILL, *Clerk.*

20 *Petition of Sunflower Oil Company.*

In Re Petition of SUNFLOWER OIL COMPANY

vs.

MOBILE AND NORTHWESTERN R. R. Co. and BEN. WILSON, Receiver.

In the United States District Court for the Western Division of the Northern District of Mississippi.

M. H. KATZENBERGER *et als.*

vs.

MOBILE AND NORTHWESTERN R. R. Co. *et als.*

The petition of the Sunflower Oil Company, a corporation under and by virtue of the laws of Mississippi, would respectfully represent to the court that on or about the 6th day of October, A. D. 1883, at solicitation of the said defendant railway company, it purchased for and on behalf of said railway company two locomotives and tenders

and fourteen freight and flat cars; that the contract prices the said Sunflower Oil Company paid, however, for said locomotives, tenders, and cars were originally agreed to and upon by and between the original vendors of said rolling stock and the president of said railway company, and petitioners paid for said property the total amount as the purchased price thereof so agreed upon by said original vendors and said president aggregating the sum of seventeen thousand six hundred dollars; that immediately after said
21 purchases the said Sunflower Oil Company caused said rolling stock all to be placed upon the road of said defendant railway Co. under a contract of rental and purchase entered into by said railway company with petitioner, by the terms of which the said railway company was to pay to said petitioner a yearly rental of fourteen hundred and eight dollars; "said rental to be due and payable on the last day of each and every month while this said contract should continue, in monthly installments;" that the said oil Co. was to pay said railway Co. as a maximum freight per ton on cotton seed in the bulk $1.75, and freight on seed in sacks not exceeding $2.00 per ton, & for other freights such rates as should be fixed at various times by the president of said two companies; and that *on* freights earned by said railway Co. for hauling seed, supplies, & products of any kind for said oil company should be credited on account of its rental of said property, and should there remain a surplus after payment, such surplus should remain in the hands of said oil company and go as a credit upon the purchase-money of said property, with interest on any such surplus in favor of said railway company at the rate of eight per centum per annum; that said contract was to continue in force until the first day of January, A. D. 1886, on or before which said date the said railway company undertook and obligated itself to purchase from said oil company all of said rolling stock and property at the aggregate price said oil Co. have paid for the pur-
22 chase thereof, to wit, the sum of seventeen thousand six hundred dollars, less the amount of the surplus, if any, with the interest thereon, as aforesaid, that should or might remain in the hands of said oil Co. at the date aforesaid; that up to the said first day of January, 1886, the said railway Co. and your petitioner had *but* complied strictly with the terms of said contract, on which said day, by the terms of an agreement mutually entered into by said *rolling* Co. and said oil Co. and entered upon and made a part of said original contract, said contract and all the terms, provisions, and requirements thereof were continued in force and extended until the 1st day of January, 1887, the original of which said contract and agreement or a duly authenticated copy thereof will be filed herewith as a part hereof, as Exhibit "A" hereto, before final hearing, if required.

Petitioner further represents to the court that the parties to said contract and agreement of extension as aforesaid were proceeding faithfully, as far as they could, to comply with the terms thereof, & so continued until the — day of ——, A. D. 1886, when, by the order of this court, Benj. Wilson was appointed the receiver of said de-

fendant railway Co. in the above-styled suit, and as such receiver he took immediate possession of all said rolling stock and continued to use the same in the operation of said railway Co. in accordance with the terms, undertakings, and provisions of said contract and agreement aforesaid; that on the said — day of ——, A. D. 1886, this court authorized said receiver to continue in force all con-
23 tracts theretofore existing relating to the rolling stock then operated by said railway Co.; and said railway Co. and the receiver thereof failing to pay said oil Co. the balance due on the contract of purchase of said rolling stock on the first day of January, A. D. 1887, as it had undertaken to do by the terms of its contract and agreement, as aforesaid, said oil Co. was willing and agreed that said contract should be further extended, and continued its dealings with said receiver on the same basis as it had done with said railway Co., receiving and making large shipments of freight by and extending credit to said railway Co. for the freights and tolls due therefor in the manner directed by said original contract—*i. e.*, to the payment, first, of rental, and the surplus to the principal of the amount due said oil Co. by said railway Co. for the purchase of said rolling stock as aforesaid; that by a subsequent order of court said receiver was authorized to consummate any agreement he might believe expedient and proper with the owner of said *rolling* looking to a change of said contract aforesaid relating to the rolling stock used in operating said road.

Petitioner states that it was ready and is now ready and willing to make and assent to any change in the said contract with said railway Co. under the aforesaid last order of this court that it may deem just and equitable, and so stated to said receiver; that it was endeavoring to come to some understanding with said receiver with regard thereto when, on the eighth day of February, 1887, the said receiver notified said petitioning Co. that he considered said contract of said railway Co. in effect abrogated and abolished and said railway Co. absolved from all liability because thereof from the
24 date of the said last-named order aforesaid, to wit, January 3, 1887, and on said day, Feb'y 8th, 1887, the said receiver demanded of said petitioner in currency the amount due said railway Co. for freight from the said 3d day of January, 1887, to date, and from that date thenceforward.

Petitioner states that said action on the part of said receiver is inequitable, unjust, and in total disregard of the vested contract rights of said oil Co., and it charges that no such action is warranted or was intended to be authorized by the said last-mentioned order aforesaid of this honorable court; that there was due said oil Co. on the contract with it, as aforesaid, by said railway Co., on the said 8th day of Feb'y, 1887, the sum of $6,732.15, as will appear by a statement of account filed herewith, marked Exhibit "B"; that it had up to said last-named day complied strictly with all the terms of its contract with said railway Co., although by the terms of said contract it was forced to and did and does now, until an equitable order can be had, pay to and allow to said receiver and to said railway Co. freight on all products hauled by it at a rate far in excess of that

charged for the same products for the same distances by the Louisville, New Orleans and Texas Railway Co., a competing line of railway, as will appear by reference to a "comparative statement of freight rates on seed," tariff of rates and charges for hauling seed, filed herewith as Exhibits "C," "D," & "E;" that under its contract with said railway Co. said oil Co. now pays said railway Co. $2 per ton for hauling its seed, long or short haul, whereas the average rate for the same service by the L., N. O. & T. R'y Co. is about one hundred (should be 50 %) per cent. less.

25 Complainant avers that the action of said receiver, as aforesaid, in demanding of it cash payments for freights for the past and for the future is not warranted by the terms or intendment of the above-named last order of this honorable court, & if carried into effect will inflict great hardship and injury upon said oil Co.; that said receiver continues in the active use and operation of all of said rolling stock in conducting the business of said railway Co., and that said stock is necessary for the despatch and conduct of the business of said railway Co.; that said oil Co. is willing that said railway Co. shall continue in possession and use thereof, upon such equitable terms as this honorable court shall name, until the full liability of said railway Co. to said oil Co. is fully discharged.

The premises considered, petitioner prays that this honorable court may direct said receiver to continue in force and observe the terms of said Exhibit "A" contract & agreement unbroken until such time as the court may name to hear and determine the matters of this petition; that on such hearing the court may order the same to continue in force until the full liability and indebtedness of said railway Co. under the terms of said contract and agreement are discharged, and that petitioner may have such further or other relief as the equities of the case may require and to the court seem meet.

And, as in duty bound, petitioner will ever pray, &c.

CUTRER & CUTRER,
Sol's for Petitioner.

26 *Order Endorsed on Petition.*

It is ordered in the within-stated cause that the receiver, Ben. Wilson, file his answer in writing to the allegations of the within petition within ten days after he shall have received a copy of this petition and order, and that if any issue of fact shall be made by said answer that each party shall have fifteen days in which to take proof thereon by deposition, giving to the adverse party three days' notice of the time and place of taking the same, and that until the the case can be further heard that the freights carried by said railroad for petitioners shall, so far as necessary, be applied to the payment for the use of the rolling stock used and employed by the receiver, or that the petitioner be not required to pay the same until the questions involved can be heard and adjudged.

Ordered this Feb'y 14, 1887.

R. A. HILL, *Judge.*

Exhibit A to Foregoing Petition.

(Exhibit A.)

This contract, made and entered into on the 6th day of October, 1883, by and between the Sunflower Oil Company of Clarksdale, in the State of Mississippi, and the Mobile and Northwestern Railroad Company, both corporations under and by virtue of the laws of the State of Mississippi, witnesseth:

That the said Sunflower Oil Company has this day agreed to purchase of the Baldwin Locomotive Works, in Philadelphia, Penn., two locomotive engines and tenders complete, named, respectively, Le Flour and Yazoo, at the price of seventy-six hundred dollars each, making together the sum of fifteen thousand two hundred dollars, and to invest the further sum of two thousand four hundred dollars in box and flat railroad cars; all of which property the said oil company agree to lease unto the said railroad for the full period of time up to January 1st, 1886, at and for the sum of fourteen hundred and eight dollars per annum, said rental to be due and payable on the last day of each and every month, while this contract continues, in monthly installments.

27

Said locomotive engines and cars are to be bought and paid for in the following manner, to wit: The engine Le Flour and said cars are to be paid for by said oil company in cash, and are at once to be and continue its property until purchased by said railroad company in the manner hereinafter provided, and said locomotive engine Yazoo is to be purchased of said Baldwin Locomotive Works upon the obligation of said railroad company, guaranteed by the mercantile firm of J. F. Fargason & Co., of Memphis, Tenn., which guaranty the said oil company has agreed to procure for said purpose; which obligation is to be paid to said Baldwin Locomotive Works six months from this date, together with six per cent. interest, and until the payment of said obligation the title to said locomotive Yazoo is to be and remain in said Baldwin Locomotive Works. Should said railroad company pay said obligation at maturity the title to said engine is to be in it, but should the said J. F. Fargason & Co. have to take up said obligation on account of their said guaranty, then the title to said locomotive Yazoo shall be and remain in said Sunflower Oil Company until said railroad company shall acquire title to it and the other said property in the manner hereinafter set forth.

28

Should said railroad company promptly meet said obligation to said Baldwin Locomotive Works for said engine Yazoo then thereafter the rental of the property above named belonging to said oil company shall be eight hundred dollars per annum, payable in monthly installments at the end of each calendar month which this contract has to run.

The said railroad company further agrees and binds itself to take all proper care of said locomotive engine, tender, and cars and turn the same over to said oil company in good order and condition at

the end of this contract, should said railroad company be then unable to purchase the same, at the price hereinafter mentioned; and said railroad company further agrees to use and operate said property upon the line of its railroad and to turn the same over, should it at any time violate its agreement, upon the demand of said oil company.

The said railroad company further agrees that it will, on or before said 1st day of January, 1886, purchase all of said property from said oil company and pay for it in cash the cost price thereof, but said railroad company shall have the right at any time before said 1st of January, 1886, to purchase the whole of said property by
29 paying the cash price thereof to said oil company, and in the event it does so the contract of rental hereinbefore set out shall immediately cease and determine, but such purchase shall not have the effect of — anywise impairing this contract so far as its other terms are concerned.

And said railroad company further agrees that it will within sixty days from this date erect houses at four, or more if necessary, of the depots on its said road for the purpose of receiving cotton seed in bulk for said oil company, and that it will have scales for weighing seed by the wagon-load, and that it will haul seed in bulk from the various points along the line of said railroad to Clarksdale, Miss., for said oil company. It is further agreed that the agents of said railroad company along the line of its road will weigh cotton seed, purchase same, if desired, all free of cost for any service to said oil company. The said railroad company agrees that it will haul all sacks for said oil company free of charge, and that it will receive and haul all freights for said oil company at the Mississippi river opposite Helena, Ark., free of storage or commission. It is understood that the freight to be paid by the said oil company to the said railroad company for hauling cotton seed in bulk or in sacks or for any product of the mill or for supplies for said mill shall be at reasonable rates, to be fixed at various times by the presidents of said two companies, but the freight on seed in bulk is not to exceed $1.75 per ton and freight on seed in sacks is not to exceed $2.00 per ton.

30 It is further agreed that said railroad company will not haul cotton seed in bulk for any other corporation or person nor permit its agents to purchase or pay for cotton seed for any other corporation or person. The said railroad company further agrees to put in a switch or side track at Clarksdale, so as to reach the mill of said oil company, so as to load and unload freight at said mill.

It is further agreed that said railroad company will give all needed facilities and preference to the said oil company to enable it to control all cotton seed along the line of said railroad as it now is or as it may be while this contract is in force. All freight earned by said railroad company for hauling seed, supplies, or products of any kind for said oil company is to be credited on amount of the rental of said property, and should there remain a surplus after paying rent it is to remain in the hands of said oil company and go as a credit upon the purchase-money of said property. Interest is to

be allowed said railroad company on such surplus at the rate of eight per cent. per annum. Said railroad company is to furnish said oil company a statement of freight due it at the end of each month while this contract continues, and the same is to be credited in the manner above stated.

This contract is to continue in force until the 1st day of January, 1886.

Witness the signatures of said companies, by their respective presidents, this day & year first above written.

THOS. T. A. LYON,
Pres't of Mobile & Northwestern R. R. Co.

31 J. T. FARGASON,
Pres't Sunflower Oil Co.

We, the undersigned, pres't and sec't'y *pro tem.* of the Mobile and Northwestern Railroad Company, certify that on the 8 day of Oct., 1883, at a meeting of the directors of said company, held at their office in Memphis, Tenn., the following resolution was passed:

Resolved, That the contract made between Thos. T. A. Lyon, pres't of the Mobile & Northwestern Rail. Co. and Jno. T. Fargason, pres't of the Sunflower Oil Company, at Clarksdale, Miss., under date of Oct. 6, '83, regarding the purchase of locomotive and cars and hauling seed, &c., is approved and ratified.

THOS. T. A. LYON, *President.*
JNO. R. FLIPPEN,
Sec. pro tem.

It is hereby agreed between the Sunflower Oil Company and the Mobile & Northwestern Railroad Company that the time for the purchase, by said Mobile & Northwestern Railroad Company, of the engines & cars of said Sunflower Oil Company mentioned in the foregoing contract be extended for one year from the first day of January, 1886, and that said contract and all the provisions thereof, with the change made in the time for the purchase of said engine & cars as aforesaid, shall be extended and continue in force until the 1st day of January, 1887.

MOBILE & NORTHWESTERN RAILROAD CO.,
By THOS. T. A. LYON, *Pres't.*
THE SUNFLOWER OIL COMPANY,
By J. T. FARGASON, *P't.*

32 STATE OF TENNESSEE, *City of Memphis:*

Before me, the undersigned, commissioner duly appointed & commissioned by the Governor of the State of Mississippi to reside in the State of Tennessee, & qualified to take acknowledgements of instruments of writing to be recorded in said State of Mississippi, this day personally appeared Thos. T. A. Lyon, president of the Mobile & Northwestern Railroad Company, and acknowledged that said railroad company and he, as president thereof, executed the fore-

going two instruments of writing on the days & years therein mentioned.

Witness my hand and official seal this 22 day of September, 1886.

[L. S.] HUNSDON CARY,
Commissioner for Mississippi at Memphis, Tenn.

STATE OF TENNESSEE, *City of Memphis:*

Before me, the undersigned, commissioner duly appointed & commissioned by the Governor of the State of Mississippi to reside in said State of Tennessee, & duly qualified to take acknowledgements of instruments of writing to be recorded in said State of Mississippi, this day personally appeared J. T. Fargason, president of the Sunflower Oil Company, and acknowledged that said oil company and he, as president thereof, executed the foregoing two instruments of writing on the days & years therein mentioned.

Witness my hand and official seal this 22 day of September, 1886.

HUNSDON CARY,
Commissioner of Mississippi at Memphis, Tenn.

33 Filed for record, Sept. 23, 1886, at 2 p. m.
R. N. HARRIS, *Clk,*
By J. ALLEN, *D. C.*

Recorded Sept. 23, 1886, in Land Record Book W, at pages 495, 496, 497, 498, & 499.

R. N. HARRIS, *Clk,*
By J. ALLEN, *D. C.*

EXHIBIT B.

CLARKSDALE, MISS., 2, 8, 1887.

The Mobile & N. W. R. R. Co., bought of Sunflower Oil Co.

1886.			
Dec. 23.	To balance statement ren'd	7,341 14	
31.	" rental for December, 1886	117 33	
1887.			
Jan'y 31.	" " " January, 1887	117 33	
			7,575 80

CONTRA.

1886.			
Dec. 25.	By earnings for seed hauled, st'm't ren'd	153 23	
" 31.	By earnings for seed hauled, st'm't ren'd	163 84	
1887.			
Jan'y 8.	By earnings for seed hauled, st'm't ren'd	50 58	
" 15.	By earnings for seed hauled, st'm't ren'd	82 42	

1887.				
Jan'y 19.	By earnings for seed hauled, st'm't ren'd		103 99	
" 29.	By earnings for seed hauled, st'm't ren'd		63 10	
Feb'y 5.	By earnings for seed hauled, st'm't ren'd		118 57	
" 1.	By earnings, Miss. fr't, for June, st'm't ren'd		76 12	
" 8.	" " seed to date		30 02	
" "	" " Miss. fr't, to date		1 78	
				843 65
	Balance due S. Oil Co.			6,732 15

EXHIBIT "D."

CLARKSDALE, MISS., 2, 8, 1887.

Special No. R. 140.

Rates on cotton seed in C. L. not less than 24,000 lb per ton of 2,000 lb, Leland and intermediate points to Clarksdale, Miss., $1.50 per ton.

M. J. BOWDEN, *Ag't.*

34 EX. "C" TO PETITION.

EXHIBIT C.

Comparative Statement of Freight Rates on C. Seeds.

L., N. O. & T. R. R., as per special No. R. 140, from Leland & intermediate points, 63 miles, to Clarksdale, $1.50 per ton.

L., N. O. & T. R. R., as per special No. 2870, from Lula & intermediate points, 20 miles, to Clarksdale, average rate, $1.28 per ton.

L., N. O. & T. R. R., special from Hood's to Walczeuski's Station, 86 miles, $1.50 per ton.

Mobile & Northwestern R. R., from Glendale to Clarksdale (30 miles) & intermediate points, $2.00 per ton.

Average difference in rates will exceed $1.00 per ton in favor of the L., N. O. & T. R. R.; the M. & N. W. R. R. being about 100% more than the L., N. O. & T., or about double.

Ex. E to Petition.

Exhibit "E."

Louisville, New Orleans & Texas Railway Company,
General Freight Department,
Memphis, *Sept.* 28, 1886.

Special F. No. 2870. Special F. 1925.

Rates Per Ton of 2,000 *Pounds on Cotton Seed.*

Distances.	In C. l'd not less than 12 tons.	L. C. L.
5 miles & under	$1 20	1 50
10 miles and over 5	1 20	1 50
15 " " " 10	1 30	1 73
20 " " " 15	1 40	1 75
25 miles and over 20	1 50	1 88
30 " " " 25	1 60	2 00
35 " " " 30	1 70	2 13
40 " " " 35	1 75	2 19
45 " " " 40	1 80	2 25
50 " " " 45	1 85	2 31
55 " " " 50	1 90	2 38
60 " " " 55	1 95	2 44
65 " " " 60	2 00	2 50
70 " " " 65	2 05	2 56
75 " " " 70	2 10	2 63
80 " " " 75	2 15	2 69
85 " " " 80	2 20	2 75
90 " " " 85	2 25	2 82
95 " " " 90	2 30	2 88
100 " " " 95	2 35	2 94
110 " " " 100	2 40	3 00
120 " " " 110	2 45	3 06
130 " " " 120	2 50	3 13
140 " " " 130	2 55	3 19
150 " " " 140	2 60	3 25
160 " " " 150	2 60	3 25
170 " " " 160	2 65	3 31
180 " " " 170	2 70	3 38
190 " " " 180	2 75	3 45
200 " " " 190	2 80	3 50
250 " " " 200	2 90	3 63
300 " " " 250	2 90	3 63
350 " " " 300	3 00	3 75
500 " " " 350	3 00	3 75

36 Car-load rates apply only when shipment is to be moved at carrier's convenience, loaded by shipper and unloaded by consignee, and company released from damage and liability as to checks, otherwise use L. C. L. rates.

E. W. HOW, *G. F. A't.*

Filed Aug. 9, 1887.

G. R. HILL, *Clerk.*

And afterwards, to wit, on 23 Feb'y, 1887, the said receiver filed his answer — cross-petition to the foregoing petition, which is in the words & figures following, to wit:

Answer of Receiver & X Petition.

In the District Court of the United States for the Western Division of the Northern District of Mississippi, at Oxford.

M. H. KATZENBERGER *et als.*
vs.
THE MOBILE AND NORTHWESTERN RAILROAD COMPANY *et al.*

In this cause the receiver, Ben. Wilson, for answer to the petition of the Sunflower Oil Company filed herein on the — day of February, 1886, would respectfully state and show unto the court as follows: That this respondent files herewith as Exhibit "A" and makes same a part of his answer a copy of the written contract between said Sunflower Oil Company and defendant railroad company regarding the lease and option for the purchase of the two (2) engines and fourteen (14) freight cars mentioned in said petition, which contain, so far as respondent is informed or believes, the entire contract about that matter between said parties, and the terms of which
37 show and speak for themselves what such contract was. Respondent is not advised as to the correctness of the account filed with the petition of said oil company as to monies paid it by the defendant railroad company on account of said lease contract, but granting that the same is true, the respondent is advised that thereunder said railroad company by said payments is the owner of nearly two-thirds in value of said rolling stock, having paid about that much of the stipulated price therefor in case said railroad company should b-y same. Respondent is advised, however, that said contract between said oil company and said railroad company was, in its tenor and effect, simply an agreement for the lease of said engines and cars by said oil company to said railroad company, with the right and privilege or option on the part of said railroad company to purchase the same at the stipulated price of ($17,600) seven— thousand six hundred dollars, and expressly provided for the surrender of said rolling stock and engines on or before the 1st of January, 1886, or the 1st of January, 1887, to said lessor should said railroad company be then unable to purchase same at said price.

Respondent denies that at any time he has agreed with said oil company for the continuation of said contract regarding the lease of

said engines and cars, or made any terms whatever with said oil company about that matter. It is true that he has denied he was bound to pay the stipulated rental of one hundred & seventeen ($117.33) dollars and thirty-three cents, and has offered said oil company the sum of three hundred & fifty ($350.00) dollars per annum, which respondent believes to be a fair rent for their interest in same.

38 The statements in the petition of said oil company that respondent at any time agreed to pay them any other or further sum or that he agreed to continue the terms of said lease contract with said oil company are untrue and are denied. Respondent says that the rates of freight that he has charged said oil company for seed hauled over the respondent's line for said oil company were reasonable and were the same that it had stipulated to pay therefor, and said oil company has made to respondent claim for a lower rate which was granted as to certain points and with which said oil Co. expressed its satisfaction. Respondent does not understand how the Louisville, New Orleans and Texas Railway Company can charge about one hundred (100%) per cent. less than respondent's rates for like service unless petitioner means thereby to say that said Louisville, New Orleans and Texas Railway Company is offering to do such service for nothing, for that would be the effect of a- one hundred (100 %) per cent. reduction, as respondent is informed & believes the rates he has charged against said oil company are substantially the same as those charged by the said Louisville, New Orleans and Texas Railway Company for the services, when it is considered that said oil company give, to said L., N. O. & T. R'y Co. all its shipments of cotton seed-products, both on seed hauled by respondent and by said L., N. O. & T. R'y, and gives to respondent nothing for export from Clarksdale.

Respondent is advised and so states that the terms of said lease contract regarding special rights and privileges for said oil company and excluding others from receiving like services on re-

39 spondent's road for the same prices are illegal & void. It is apparent from the terms of said contract that said oil company was thereby stipulating for special rates, rights, and benefits to the exclusion of other persons of said road and the public in general, all of which respondent is informed and believes are illegal.

Respondent is further informed and advised & so states that by virtue of the payments admitted by said petition to have been made for and on account of said engines and cars that said railroad company thereby became the owner of an undivided interest in said engines and cars in the ratio or proportion of its said payments to the said stipulated total price, and that said company is either the owner of said undivided interest therein or, upon a cancellation of said option for the purchase thereof, is entitled to a lien upon said engines and cars for the amount so paid thereon.

Respondent says that it is inequitable and unjust to the defendant railroad company to consummate said purchases and acquire said engin-s and cars under said option, because the value of all such engin-s and cars have declined in the market since the said contract between the oil company and railroad company was made, in 1883,

and respondent can duplicate said engin-s and cars at four thousand ($4,000) or less. The narrow-gau-e road between St. Louis and Cairo recently acquired by the Mobile & Ohio Railroad Company and the St. Louis, Arkansas and Texas railroad, some seven hundred (700) miles in length, have both been changed from narrow to standard gauge, and both companies have large numbers of engin-s
40 and cars for sale which can be bought at very low prices. There is no demand for such articles, and both said companies are pressing respondent to buy from them, which he can do, as above stated, at about four thousand ($4,000) dollars, and it would be inequitable and unjust to defendant railroad company or its other creditors to pay more than that sum for said articles or more than a reasonable rental on that valuation for their use.

Respondent shows that said oil Co., since the opening of said L., N. O. & T. R'y Co., has and now by its said petition is attempting to use said M. & N. W. R. R. Co.'s line for its (said oil company) profit in hauling seed to it at advantageous rates & giving nothing by way of return freights; that said oil Co. makes all its shipments of oil-cake & meal by said L., N. O. & R. R'y and now by respondent's road; that such is one-sided and it will be unjust to require respondent to continue same.

Respondent is advised that def't R. R. Co. has not bound itself for the purchase of said engines and cars and has never exercised its option for their purchase, and that respondent is entitled to recover from said oil Co. the sum of $10,258.86 retained by them because of freights due said R. R. Co., as shown by their said account.

May this be filed both as an answer to said petition of said Sunflower Oil Company herein and as a cross-petition for the recovery of said $10,258.86, and respondent asks the court to construe said contract and decree the rights of said oil Co. and respondent thereunder, and for general relief.

BEN. WILSON,
Receiver Mobile & N. W. R. R. Co.

Filed 23 Feb'y, 1887.

G. R. HILL, *Clerk.*

41 And afterwards, to wit, on the 9 March, 1887, said oil Co. filed their answer to the cross-petition of Ben. Wilson, receiver, which is in the words & figures following, to wit:

Answer to X Petition.

In the United States District Court for the Western Division of the Northern District of Mississippi.

M. H. KATZENBERGER *et als.*
vs.
THE MOBILE & NORTHWESTERN R. R. Co. *et als.*.

In this cause, in the matter of the cross-petition filed herein by Ben. Wilson, receiver of said R. R. Co., against the Sunflower Oil Co., the

said oil Co., reserving to itself all manner of exception thereto for any and all errors therein contained, for answer thereto & to so much thereof as this respondent is advised it is material or necessary for it to answer, answering, says that it is not true that said M. &. N. W. R. R. Co. is the owner of two-thirds of the rolling stock named in this respondent's original petition herein, nor is the said R. R. Co. the legal owner of any part thereof or portion of the same, but that it is only under contract to purchase the same at the price named in said original petition. Respondent denies that the tenor and effect of the contract set forth by it in its said — petition simply an *an* agreement for the lease of said engines and cars by the said oil Co. to said R. R. Co. with the right and privilege or option on the part of said railroad Co. to purchase the same at the stipulated price. On the contrary, respondent avers that in express terms said contract proves that the said M. & N. W. R. R. Co. further
42 agrees that it will, on or before the first day of January, 1886, purchase all of said property from said oil Co. and pay for it in cash the cost price thereof, and by a further agreement appended to and made a part of said contract it is agreed between the Sunflower Oil Co. and the M. & N. W. R. R. Co. that the time for the purchase by said M. & N. W. R. R. Co. of the engines and cars of said Sunflower Oil Co. mentioned in the foregoing contract be extended, &c.; that said entire contract was undertaken and entered into by said oil Co. at the express solicitation of said railway Co., and that the purpose, understanding, and intent of said railroad Co. and said oil Co. in making the same and the circumstances attendant thereon were as follows: That said railway Co. had contracted for the construction and purchase of said property with the makers and original owners thereof, and at the time said rolling stock was completed and ready for delivery said railway Co. was without the means to pay for it or otherwise secure the possession & use thereof; that it was without a single operating locomotive or other necessary rolling stock on its said road and entirely without the means to carry on its business in such condition; said railway Co. made application to said oil Co. to advance to said railway Co. the money or security necessary to enable said railway Co. to complete its agreement of purchase of said rolling stock, and *and* proffered as security to said oil Co. for the repayment to it of such sums as it should so advance that said oil Co. should take and reserve to itself the legal title to all of said property and reserve all earnings on account of freights hauled for said oil Co. until said defendant'- interest
43 should be discharged in full; that said agreement and understanding had by said oil Co. and said railway Co. was acted upon; said rolling stock purchased for said railway Co. by said oil Co. and the cost price thereof charged against said railway Co. by said oil Co., together with interest thereon at eight per centum per annum; that said agreement was substantially in spirit, interest, and effect embodied and set forth in said written contract hereinbefore mentioned; that in said contract the interest due said oil Co., eight per centum on 17,600.00 advanced by said oil Co., equaling $1,408.00, was charged against said railway Co. in the way of rental,

the said oil Co. having reserved the title to all of said property by way of security for its advance as aforesaid, and to offset this rental the railway Co. was allowed interest at an equal rate on all earnings in excess of the monthly interest due by it on its indebtedness to said oil Co., thus securing the application of payments made by said railway Co. to said oil Co. on said account in all things in the manner directed by law when partial payments are made on contracts (Code, 1880, sec. 1144), the manifest effect of which arrangement of rentals, so called, has been at all times and is now only that said railway Co. has secured and paid to said oil Co. a legal contract of interest, to wit, eight per centum per annum, on only the true balance of account from time to time due said oil Co. by said railway Co. Respondent denies that $350.00 annually, as offered it by said receiver, would be a fair return on the amount due it by said railway Co. Respondent insists that the only reasonable rental or return that can be made it is the payment of such sum annually
44 as will discharge the contract rate of interest on and in such limited times as may be deemed equitable by this honorable court to liquidate the balance due it on account of the aforesaid indebtedness of said railway Co. or the immediate discharge of said indebtedness *in solido*.

Respondent confesses the error and inaccuracy of statement contained in the averment of its original petition herein, that the average rates of freight charges for the same services by the L., N. O. & T. R. R. Co. are about 100 per cent. less than those charged by contract by the M. & N. W. R. R. Co. Respondent intended to & should have averred that they were 50 per cent. less. The mistake is the result of inadvertance, and respondent begs leave to amend the said averment as above indicated and to reiterate the averment as so amended. Respondent admits that it gives to the said L., N. O. & T. R. R. Co. the greater portion of its oil products for export from Clarksdale, but that it does so solely because said M. & N. W. R. R. Co. is not properly equip-ed for carrying the same with facility, safety, and expedition; nor has it at any time been able to offer respondent rates for such services. It has never been able to compete with the L., N. O. & T. R. R. Co., either for the hauling of cake or oil. Respondent has shipped its products of linters almost entirely by the M. & N. W. R. R. Co., this being the only product upon which said railroad could offer favorable rates. Respondent disavows any purpose, endeavor, or intent to use said M. & N. W. R. R. Co. to secure it advantageous rates. On the contrary, it avers
45 that it has at all times been ready and desirous to pay said railway Co. reasonable rates for all manner of service performed by it for said oil Co., and it does not by this proceeding seek to do otherwise. Respondent disavows & always has disavowed any desire to seek enforcement of any rights or privileges conferred on it by the terms of said contract which it is advised are contrary to public policy & void. It did not ask for any such relief in its petition to this honorable court, & it here now disclaims any right or title to the same.

Respondent further states that it has never demanded the enforce-

ment of its contract with said railway Co. to the full letter and intent thereof in all details. It has never compelled said railway Co. to build seed-houses at four or more, if necessary, of the depots on its said road for the purpose of receiving seed for said oil Co.; nor have the agents of said road purchased and handled seed for respondent free of cost. On the contrary, said oil Co. has paid for its seed-houses and agents, without recourse to its said contract, exclusively with its own funds.

Respondent denies that said railway Co. has in any manner become the owner of any undivided interest in said engines and cars in the ratio or proportion of its payments to the stipulated price therefor, or that said railway Co. under any circumstances is entitled to a lien upon said engines and cars for the amount so paid thereon.

Respondent denies that the fact that said receiver may be able to duplicate the said property said railway Co. is under contract to purchase from respondent at a less sum than that due said
46 oil Co. therefor is any legal excuse for its failure or refusal to complete its contract of purchase with said oil Co. by the payment of the balauce due on said contract. The reason- assigned for the excessively low prices of such articles at this time show such prices to be unprecedented and abnormal, and they afford no fair or proper standard of valuation. The prices were agreed upon by the properly authorized officers and agents of said railway Co. at the time of their purchase for said railway Co. by said oil Co., and it would be inequitable and unjust to suffer unnatural subsequent fluctuations of market values to disturb or destroy former agreements or contracts of valuation or prices fixed upon in good faith, and especially so when the oil Co., the contract creditor, exercised no motion or voice in the ascertainment or fixing of such valuation in the first instance.

Respondent denies that said railway Co. or said receiver is entitled to have and recover of it the sum of $10,258.86 or any sum whatever, retained by it because of freights due said railway Co. Respondent avers that all freights earned by said railway Co. from said oil Co. were mutually credited and charged by said railway Co. and said oil Co. from the date of said contract of purchase on account thereof, the said oil Co. charging on its books against said railway Co. the amount due it by said railway Co, to wit, $17,600.00, and the interest, at eight per cent., accruing thereon, in conformity to the agreement had by it, as aforesaid, with said railway Co. at the time it made advances to said railway of said sum of money aforesaid, and crediting on said account the earnings of said
47 railway in the manner provided by said agreement, and the said railway Co. crediting on its books of account the said oil Co. with the said sum so advanced to it as aforesaid, to wit, $17,600.00, and charging against the same the freights and charges due it by said oil Co. in the manner hereinbefore stated; that such application of the various sums due by the said oil Co. to the payment of the greater amount due said oil Co. by said railway Co. was made by the current consent, understanding, agreement, and action

of said two companies up to the time of the appointment of the receiver herein, and said indebtedness of said railway Co. to said oil Co. was thereby agreed to be and was reduced and discharged *pro tanto* with said settlement, accounting, application of payments, and discharge of mutual charges and indebtedness. Respondent is advised — is final and conclusive between the parties thereto, and the said receiver cannot be heard to object thereto. Now, since the appointment of said receiver respondent has claimed and still claims the right to continue the account of said railway Co. and said oil Co. in the same manner, under the former order of this court, until this court shall direct and decree otherwise.

Respondent again denies that under said contract the option to purchase was given to the said railway Co., and that said railway Co. has not bound itself to purchase the same. On the contrary, respondent avers said contract is clearly a contract on the part of said r'y Co. to purchase said property at a day certain, which this honorable court should enforce.

48 Respondent is advised that the amount due by the terms of said contract as an obligation contracted in carrying on the business of said corporation is rightly payable out of the freights earned by said railway Co. for respondent; but if the court should, under any possible aspect of the case, be of a mind to hold that said contract confers an option to purchase or not, according as said railway Co. shall be able or unable to do so, then this respondent denies that said railway Co. is unable to complete said purchase or was so unable on the day named in said contract and addendum. Respondent avers that said rolling stock is necessary to the conduct and carrying on of the business of said railway Co. Unless this contract of purchase with respondent is carried into effect said receiver will have to purchase rolling stock elsewhere, and this respondent now puts it within the power of said receiver for said railway Co. and removes and waives any inability on the part of said receiver to complete and carry out the terms and provisions of said contract because of any want of means to pay cash for said rolling stock by offering hereby to transfer to and vest in said Co. the legal title to all of said rolling stock upon the execution and delivery to said oil Co. of the certificates of said receiver, payable at such an early day as the court may direct, in an amount equal to the balance shown to be due said oil Co. on a true statement of the accounts between the two companies up to the date of such statement, and to accept such certificates in full discharge of the aforesaid contract obligation of said railway Co.

49 And now this respondent, having fully answered herein, prays hence to be dismissed.

CUTRER & CUTRER,
Solicitors for the S. O. Co.

Filed March 19, 1887.

G. R. HILL, *Clerk.*

Proof Taken & Used in this Proceeding.

In the United States District Court for the Western Division of the Northern District of Mississippi.

M. H. KATZENBERGER *et al. vs.* MOBILE & N. W. R'Y CO. *et als.*

In Re the Petition of THE SUNFLOWER OIL COMPANY
vs.
BENJ. WILSON, Receiver of said Railway Co.

Interrogatories to be propounded to Thos. T. A. Lyon, the answers to which are to be used on the final hearing of said petition.

Int. 1. State your name, place of residence, and occupation, and whether or not on the 6th day of October, A. D. 1883, you were acquainted with the officers or managing officials, or any of them, of the Mobile and Northwestern Railway and the Sunflower Oil Companies, respectively, both of Coahoma county, Mississippi; if you state you were so acquainted, give the names and official positions of such as you may have known at that time.

50 Int. 2. How long did or have said officers aforesaid, respectively, continued in discharge of the duties of their several offices and up to what date did such officership or authority extend?

Int. 3. If, in answer to either of the preceding interrogatories, you you should state that on the day named therein you were an official of said railway company, state whether you were and are familiar with the execution and terms of a certain written contract entered into by said companies on the said day aforesaid with regard to certain rolling stock described therein and with all the facts and circumstances that superinduced and attended its execution; if so, state fully those facts and circumstances.

Int. 4. State the condition of said railway company, financially and otherwise, at that time. Did it or not have the rolling stock necessary to the conduct and carrying on of its business? What available operating locomotives or other rolling stock did it have at that time, if any, and was or was not the rolling stock purchased under said contract necessary to and then and now used in carrying on the business of said railroad?

Int. 5. Who originally contracted with the manufacturers of said rolling stock for the purchase thereof and who agreed with said manufacturers as to the prices to be paid for the same? In what light did your company consider said contract of October, 1883—as a contract of rental only or an agreement on the part of said railway company to purchase said rolling stock on the terms and at the time named therein? Upon what understanding of

51 said contract did you conduct your business relation- and dealings with said oil company as to all matters arising after the execution and growing out of the same?

Int. 6. State whether or not said railway company gave its obli-

gation to the Baldwin Locomotive Works for the sum of $7,600.00 and whether or not the endorsement of J. T. Fargason & Co. was secured thereon by said oil company for the purchase of the locomotive engine Yazoo, as described in said contract, and what amount or amounts, if any, were paid by said oil company on account of said obligation. Were said amounts credited by said railway company on the accounts of said oil company with it.

Int. 7. How have your accounts with said oil company been kept since October 6th, 1883? State what, if any, amounts and for what account the account of said oil company with your road has been credited with at the time and since the execution of said contract. State whether or not statements of account have been rendered to and received from said oil company under said contract since its execution and during the continuance of your management of its affairs. State particularly whether or not in August of 1886 or later said railway company rendered to said oil company a comprehensive statement of the account between said two companies, embracing and inclusive of all dealings between them from the said 6th day of October, 1883, to the date of such statement; if so, state as accurately as you can what was shown by said statement, the nature and character of the various items thereof, debit and credit;

52 whether or not you then agreed with said oil company upon a correct statement of account showing the balance of indebtedness then due said oil company, and whether or not such statement was thereupon accepted, both by said railway and oil companies, as being a full and complete accounting of all matters between said companies up to that date. What amount, if any, was shown to be due said oil company by your said statement of account? File herewith, if you have it, as a part of your answer to this interrogatory, with your name written across the face of same, the original or a copy of said statement or any reliable memorandum or memoranda you may have of the same, if you have neither the original nor a copy thereof. If you have neither original copy nor memoranda, as asked for above, then give fully your recollection of the matters embraced in said statement of your company and your subsequent accounting thereon and settlement thereby with said oil company.

CUTRER & CUTRER,
Sol's for S. O. Co.

The issuance of a commission, notice of the time and place of taking the deposition of Thos. T. A. Lyon, are hereby waived, and it is agreed that the answer of said witness to the foregoing direct and the annexed cross interrogatories may be taken by and be sworn to before any officer of the State of his residence authorized by the laws of such State to take and certify oaths, the right to except to relevancy and competency and all matters of substance being expressly reserved.

CUMMINS, *Att'y.*

Cross-Questions Propounded to Thos. T. A. Lyon by H. Cummins, Att'y, etc.

53 1st. Reserving all manner of exception for incompetency, irrelevancy, etc., say who is present when you prepare and make your answer to foregoing questions-in-chief and who prepares and writes out such answers.

2. State when was the last meeting of the board of directors of your M. & N. W. R. R. Co.; give date.

3. State when was the last meeting of the stockholders of your M. & N. W. R. R. Co.; give date.

4. State your accounts of your transactions with said Oil Co. about said rolling stock; file copies of such accounts — your books; say whether receipts have been exchanged between said oil Co. and your R. R. Co. on any settlement of such accounts; and, if so, file same with your answer.

5th. Say whether the statement of your R. R. Co. dealings with said oil Co. mentioned in question 7 in chief and your answer thereto are in writing; if so, file such writing or account for your inability to do so, and file copies; or, if you do neither, state why.

6th. Say particularly in what particulars your answers-in-chief and cross are of your own knowledge or on information; state the source from which derived. When you state understandings of either company relate minutely the persons who so understood and how you so know; file with your answers to these questions copies of all minutes or written proceedings & accounts, agreements, settlements, and receipts your R. R. Co. have had, made, done, or given about this rolling-stock matter with said oil Co.; or, if you do not file such writings, state fully why not, where same can be found, and
54 in whose possession such may be found; also file all statements rendered your R. R. Co. by *by* said oil Co., all receipts given by said oil Co. to your Co. on ac. — these matters.

HOLMES CUMMINS, *Att'y.*

Re-examination of said witness:

Int. 1. State whether or not the resolution of the board of directors of the M. & N. W. R. R. Co., adopted at a meeting of said board held on October 8, 1883, approving & ratifying the contract made between Thos. T. A. Lyon, pres't of the M. & N. W. R. R. Co., & Jno. T. Fargason, pres't of the Sunflower Oil Co., at Clarksdale, Miss., under date of Oct. 6, '83, regarding the purchase of locomotives & cars referred to —. And was — an adoption and ratification by said board of the contract hereinbefore named?

CUTRER & CUTRER,
Sol's for S. O. Co.

Now the said Thos. T. A. Lyon, having been by me duly sworn to speak the truth, the whole truth, & nothing but the truth in answer to the foregoing direct & cross interrogatories, makes answer thereto as follows, to wit:

Int. 1st. Thos. T. A. Lyon; Glendale, Miss.; pres't Mobile & Northwestern Railroad Co.; knew J. T. Fargason, pres't, & A. M. Littlejohn, sup't of Sunflower Oil Co., on Oct. 6th, 1883. I was pres't and general manager of railroad Co.

Int. 2. I have been pres't of road for over ten years; do not know how long officers of oil Co. have held positions.

Int. 3rd. I made the contract alluded to; made the whole
55 of the negotiations that superinduced and led to its execution. In January, 1883, several parties, then creditors and directors of the Mobile and Northwestern Railroad Co., proposed to go into a syndicate and purchase stock of said road, with the view of extending road and of paying debts for said road. It was deemed necessary for the company to have new and more locomotives & cars. I was advised to contract for two locomotives, which I did, with the Baldwin Locomotive Works of Phila., the two locomotives to be completed in 9 mos. from date of contract and to cost $7,600.00 each in cash, f. o. b. cars, at the company's works, the length of time and cost being occasioned by the great demand for locomotives at the time. In Sept., 1883 (about the 19th of the month) the locomotive Coahoma, the only one we had, broke her cylinder. There was no chance to get new one under six weeks. At this time I found the two new locomotives would be finished by Oct. 1, '83, but had no money and did not see any way to get the $15,200.00 to pay for same, so made a proposition to Mr. Fruanson that the Sunflower Oil Co. should pay for the two locomotives and some cars that we needed, and so the negotiation ended in the contract alluded to:

Int. 4. The railroad company was financially pretty hard up. It did not have sufficient rolling stock at the time. We had on- locomotive, which was disabled and not in working order. At time of purchase rolling stock was necessary, as I have known two out of the locomotives disabled at the same time. As to necessity at the present time, I am unable to state.

56 Int. 5. I originally contracted with manufacture-s and agreed upon prices. My opinion at the time of contract, Oct. 6, '83, with the Sunflower Oil Co. was that they would buy the property and own same until railroad company had paid for the whole, with interest at 8% on amounts paid out, allowing 8% on amounts due railroad company. Of course, I never had any idea but that the R. R. company would eventually become the purchaser and owner of the rolling stock, such being my idea when contract was made. The railroad Co. charged up to Sunflower Oil Co. all freights hauled for said oil Co., and in making up account allowed 8% interest on sums of money paid out by said oil Co. up to Ja'y 1, '85, charging 8% interest on all sums due by Sunflower Oil Co. up to same date, & so for the following year, &c.

Int. 6th. The railroad Co. did give note for $7,600.00 to Baldwin Locomotive Works, with 6% int., payable in 6 mos., and gave to Baldwin Locomotive Works letter of J. T. Fargason & Co., guaranteeing payment of said note if the railroad Co. did not pay. The Sunflower Oil Co. paid, April 15, '84, $313.27; on Oct. 16, '84,

$2,600.00; Feb'y 25, '85, $5,352.59. The said amounts were credited to said oil Co. on ac. rendered.

Int. 7. As to how ac. was kept, have answered in 5th answ-r. The Sunflower Oil Co. paid out for the railroad Co., through J. T. Fargason & Co., on Oct. 8, '83, $7,600; paid Baldwin & Co., on Nov. 5, '83, $2,325; paid Ohio Falls Car Co., on Mar. 20, '84, $200;
57 paid T. T. A. Lyon, on April 15, '84, $313.27; Baldwin & Co., on Oct. 16, '84, $2,600.00; do., do., on Feb'y 20, '85, $5,352.59. All the above amounts have been credited to the Sunflower Oil Co. Several ac's have been rendered. Some time the last of Aug. or early in Sept'r, '86, an account was made up by me up to Aug. 15, '86, showing the full transactions between the railroad and oil Co., excepting I failed to charge up one pair of platform scales. This account was made up for the purpose of having a settlement, as oil Co. had sold out to American Trust Co., as I understood. I did not retain detailed statement of said account, but did keep memorandum of the general ac., showing aggregate credits and debits, as given on next page:

Oct. 8, '83.	By cash p'd B. P. W. & Co.		$7,600 00
	Int. to Jan'y 1, '85		832 97
Nov. 5, '83.	By cash p'd Ohio Falls Car Co.		2,325 00
	Int. to Jan. 1, '85		214 93
Apr. 15, '84.	By cash p'd B. P. W. — Co.		313 27
	Int'r. to Jan'y 1, '85		17 76
Oct. 16, '84.	By cash p'd B. P. W. & Co.		2,600 00
	Int. to Jan'y 1, '85		35 00
			$13,938 93
Jan'y 1, '85.	To am't ac's to date, No. 1		3,626 51
			$10,312 42
	By 1 yr.'s int'r. to Jan'y 1, '86		824 99
Feb'y 20, '85.	By cash p'd B. P. W. & Co.	5,352 59	
	" int. to Jan'y 1, '86	368 69	
			5,721 28
			$16,858 69
Jan'y 1, '86.	To am't ac. to Jan'y 1, '86, No. 2		6,732 91
			10,632 03
58	Over		10,632 03
Aug. 15, '86.	To am't ac. to Aug. 15, '86, No. 3		1,103 20
	Bal. due oil Co. Aug. 15, '86		$9,258 33

My understanding was that the above account was agreed to be the true and correct amount due to the Sunflower Oil Co. on Aug. 15th, 1886.

On Dec. 20, 1886, I made out an account against said oil Co. from

Aug. 15, '86, showing balance due said Sunflower Oil Co. of $7,023.26, seven thousand and twenty-three $\frac{26}{100}$ dollars, which I consider due on the locomotive and cars, excepting that said oil Co. still owes railroad Co. for one pair platform scales.

THOS. T. A. LYON.

1st X. No one present; wrote answers myself.
2d X. Do not remember.
3d X. Do not remember.
4th X. Account filed in answer to direct question 7; no receipts ever exchanged, but each month statement made of quantity of cotton seed and other freight by railroad for Sunflower Oil Co. by the railroad Co. The credits of what had been paid out by the Sunflower Oil Co. was not until some time in August or Sept., 1886. The reason this entry was made was because the Sunflower Oil Co. sold to other parties and wanted a settlement of ac's, so as to show amounts due by R. R. Co. to Aug. 15, '86. This ac. is stated in answer to direct question #7 and shows railroad Co. owed $9,528.83. The Sunflower Oil Co. claimed a larger sum, claiming, under contract, they were to charge so much per month, while I claim
59 my account was correct, as per my understanding, and Mr. J. T. Fargason, pres't, agreed that $9,528.83 was the proper amount. On Dec. 20th I made out ac. against Sunflower Oil Co., as per same basis of settlement or agreement in August. This account showed bal. due of $9,023.26. I kept no copy of the account, so cannot file same.
5th. Have answered this to X 4.
6th. All I answered is from my own knowledge and from my books; had no information or knowledge from any member of Sunflower Oil Co., except J. T. Fargason, pres't. I made the whole negotiation regarding rolling stock with him; have stated fully our accounts, &c., showing amount money advanced—amount of Sunflower Oil Co. claim and amount of railroad Co.'s charges for freight, &c. I file copy of contract and proceedings had by the board of directors.

THOS. T. A. LYON.

Sworn to and subscribed before me this July 9, 1887.

HUNSDON CARY,
Notary Public.

Filed Aug. 9, 1887.

G. R. HILL, *Cl'k.*

The following *is* the deposition of John T. Fargason & A. M. Littlejohn & exhibits attached thereto, to wit:

In the United States District Court for the Western Division of the Northern District of Mississippi.

60 M. H. KATZENBERGER *et als.*
vs.
M. & N. W. R'Y Co. *et als.*

In re the Petition — SUNFLOWER OIL COMPANY
vs.
BENJ. WILSON, Receiver of said Railway Co.

Interrogatories to be propounded to Jno. T. Fargason and A. M. Littlejohn, the answers to which are to be use- on the final hearing of said petition.

Int. 1. State your name, place of residence, and occupation, and whether or not, on the 6th day of October, A. D. 1883, you were acquainted with the officers or managing officials, or any of them, of the Mobile and Northwestern Railway and the Sunflower Oil Companies, respectively, both of Coahoma county, Mississippi. If you state you were so acquainted, give names and official position of such as you may have known at that time.

Int. 2. How long did or have said officers aforesaid, respectively, continued in discharge of the duties of their several offices?

Int. 3. If, in answer to either of the above interrogatories, you say you are, and were on the day named therein, officials of said oil company, state whether or not you were and are familiar with the execution of a certain written contract entered into by said companies on the day aforesaid with regard to certain *to certain* rolling stock described therein, and with all the facts and circumstances that superinduced and attended its execution. If so, then state fully those facts & circumstances.

61 Int. 4. State what was the condition of said railway company at that time. Did or did it not have very suitable or sufficient rolling stock necessary to the conduct and carrying on of its business? What, if any, available operating rolling stock did it then have, and was or was not the stock purchased under said contract necessary to and then and now used in carrying on the business of said road?

Int. 5. In what light did your company consider said contract of October 6th, 1883—as a contract of purchase by said railway company or of rental only? How did you act under the same, on your construction and understanding thereof, and did or did not said railway company, know- of such practical construction and understanding thereof on your part, acquiesce in such construction thereof and conduct themselves and on its part at all times act as though it held similar views as to the true force, effect, intent, purpose, and construction of the same? State whether or not said railway company gave such practical effect thereto and adopted such practical construction thereof by its acts and conduct and in all its dealings with said oil company with regard to all matters growing out of said contract as to induce said oil company to believe, and whether or

not said oil company did so believe, that the understanding of said two companies as to the construction and effect of said contract was and continued to be identical.

Int. 6. State whether or not the said railway company gave its obligation to the Baldwin Locomotive Works for $7,600.00 and the Sunflower Oil Company secured the indorsement thereof by J. T. Fargasen & Co., undertaken by it for the purchase of the locomotive engine "Yazoo." as described in said contract, and what amount or amounts, if any, were paid by said oil company on account of said obligation and the said endorsement thereof by said Fargasen & Co., as secured by it as aforesaid, and at whose instance and request were such payments so made. Have you in possession said original obligation or any renewal, renewals, or extensions thereof? If so, attach the same as a part of your answer hereto; if not, state where same now are, and in lieu thereof attach copies of the same, if you can secure them. Identify such papers by writing your name across the face of each.

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Int. 7. How have your records been kept against said railway company since October 6th, 1883? State whether or not, and what, if any, charges have been made by you against said railway company at the time or after the execution of said contract, and whether or not statements since then have been rendered said railway company by said oil company and by said railway company to said oil company. If so, state the nature of such statement and the several items embraced therein and the dates of such items. Were or were not the general items, debit & credit, mentioned in the statements so rendered and received, respectively, by said companies similar in character and in the manner in which they were respectively charged and credited thereon?

Int. 8. State particularly whether or not in August of 1886 or later said oil company rendered to & received from said railway company a statement of account inclusive in full of all dealings between said two companies from the said 6th day of October, 1883, to the date of such statements. If so, what was shown by such statements? State whether or not the aforementioned note or obligation of said railway company for $7,600.00 and the several amounts paid by said oil company on account thereof and all other amounts paid for or on account of charges on said rolling stock were set forth and included in either or both of such statements. How was payment in full of all amounts due by said oil company to said date for freights hauled and other services rendered by said railway company for its account asked and demanded of said oil company by said railway company, and how were same agreed upon to be paid and then paid, satisfied, set off, and cancelled? To what account, if any, were such amounts due for freight and services as aforesaid then applied and credited by said oil company, and by whose direction or authority was such application so made? Were or were not such statements as rendered and mutually agreed upon by said companies thereupon accepted and received by them as a full accounting and settlement of all matters of indebtedness and accounts subsisting between them prior to the date and acceptance of such statements, and

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were or were not such statements thereupon accepted as showing the true balance due said oil company by said railway company at that time? Were or were not such statements based, both by said railroad and oil companies, on the uniform course of dealings adopted by said companies as their understanding of the terms and effect of said contract aforesaid at the time of the execution thereof and continued without interruption from said date to the date of said settlement and accounting? Was or was not said oil company then authorized by said railway company and subsequently by the order of the U. S. district court herein, as understood by you, to con-
64 tinue without modification or change its former course of dealings as stated? File as a part of your answer hereto the original of said statements of account as rendered said oil company by said railway company and afterwards agreed upon, accepted, and acted on by you as correct; or, if said original cannot be found, file a copy thereof instead, with your name across the paper or papers you may file, & identify same.

Int. 9. File as a part of your answer hereto an accurate, succinct statement of account in full between said oil and railway companies from the time of your settlement with said railway company, in August, 1886, to the present date of taking this deposition. State the amount such statement shows to be due said oil company by the M. & N. W. R'y Co.

Int. 10. State who is the general managing officer of said oil company; who was such on January 1st, 1887. State whether or not said oil company on that day was willing and agreed to such a further extension of the provisions of said contract as had formerly been had or as might thereafter be agreed upon, and on what such understanding was based. When was such general manager first officially advised of the purpose of said railway company, through the action of its receiver, to repudiate, defeat, and deny its contract to purchase the said rolling stock then in its possession and use? State whether or not you ever understood, considered, or acted upon said written contract aforesaid, or any clause, part, or portion thereof, as conferring on said railway company "the right and privilege or option to purchase said rolling stock," as it should determine,
65 on the 1st day of January, 1886. Did or did not said railway company ever intimate or contend that such was the purpose, force, or effect of said contract, and did you or not ever hear such a claim set up or in any manner made until informed by the said receiver herein as aforesaid?

Int. 11. State what reduction of the rate of rental named in said contract, if any, you have agreed to, and from what date does such agreement operate. State any other matter that may be of benefit to either party to this litigation.

CUTRER & CUTRER,
Sol's for S. O. Co.

The issuance of commission, notice of the time and place of taking the depositions of the said Jas. T. Fargason and A. M. Littlejohn are hereby waived, and it is agreed that the answers of said wit-

nesses to the foregoing direct interrogatories may be taken by & sworn to before any officer of the States of their respective residence authorized by the laws of such State to take and certify oaths, the right to except to relevancy and competency and to all matters of substance being expressly reserved.

CUMMINS, *Att'y.*

Cross-interrogatories propounded to A. M. Littlejohn and J. T. Fargason by Holmes Cummins, att'y, etc., reserving all manner of exception for incompetency, etc.

1st. State who is present with you when you propose to give your answers to questions-in-chief attached hereto. State the
66 name of each person so present, whether of counsel to either party interested in this litigation. State who prepared your answers herein and wrote the same out.

2d. When giving your understanding or the understanding of said oil company or the understanding of said R. R. Co. as to said contract of October, 1883, about said engines and cars and the settlement of accounts between your company and said R. R. Co. about that matter, please give the facts on which such understanding is based. State why and how each such understanding was so had, who it was that so understood, how you know each such person or company so understood.

3rd. File with your answer to Int. 8 and following the original statement of account rendered by your oil Co. and said R. R. Co., and with your statements of what was understood about such statements and settlements state the facts as to what was said and done by each person on which you have stated such "understanding."

4th. State whether at any time receipts were given by said oil Co. or said R. R. Co. for or upon such accounts rendered, settlements had, or understandings arrived at.

5. State whether the account filed with the petition of said oil Co. in their proceeding on account and the statements made by your company in said petition and reply filed herein as to these matters are true.

6th. State in how far and what particulars your answers in chief and cross above are of your own knowledge and how
67 far and in what particulars you have answered on information, and give your source of such information.

7. Say whether, since the appointment of a receiver herein, your oil Co. has made any agreement or had any understanding about their matters except as embodied in your written agreement, and please file such writing or a copy thereof.

HOLMES CUMMINS, *Att'y.*

Int. 1. John T. Fargason, Memphis, Tenn.; merchant, &c. On the 6th day of October, 1883, I knew Thos. T. A. Lyon, president and gen'l man'g'r of the Mobile & Northwestern railroad, and also knew the managing officers of the Sunflower Oil Co.- I was myself president and A. M. Littlejohn, sec'ry & treas.

Int. 2. Colonel Lyon occupied the position stated above from October 6th, 1883, until said road went into the hands of the receiver. I have been president of the Sunflower Oil Co. from its organization up — the present time, except from Oct., 1884, to Oct,, 1885, during which period of time Mr. O. H. P. Piper was president. A. M. Littlejohn has been sec'y & treas. since the organization of the Sunflower Oil Co. up to the present time.

Int. 3. I am and was familiar with the contract referred to. Colonel Lyon, the pres't of the railroad, approached me and opened negotiations for certain rolling stock which he said was needed for his road, and his negotiations resulted in the making of the contract.

68 Int. 4. I was informed by Col. Lyon that it did not have sufficient rolling stock for the carrying on of its business. I was informed by Col. Lyon that it had only one locomotive and very few freight cars, and I think the rolling stock purchased was necessary and had been used since its purchase up to the present time.

Int. 5. I regard the contract entered into with the railway Co. as a contract to pay rental on the rolling stock until the end of the contract and then to buy and pay for the rolling stock, and the railway Co. knew of this construction being placed upon the contract by the Sunflower Oil Co. and did acquiesce in such contract and did at all times act as though it held similar views as to the contract.

Int. 6. I know that the Mobile & Northwestern Railway Co. did give their obligation to the Baldwin Locomotive Works, and that the Sunflower Oil Co. did secure the endorsement of the firm of J. T. Fargason & Co on same.

Int. 7. I refer to the answer of A. M. Littlejohn as my answer to *the* this query, and endorse his reply thereto and make his answer mine.

Ans. Int. 8. Answered in full by A. M. Littlejohn and adopted by myself as my answer hereto.

Ans. Int. 9. This statement is filed with the answer of A. M. Littlejohn.

Ans. Int. 10. A. M. Littlejohn is general managing officer of Sunflower Oil Co. and was such on Jan'y 1, 1887. It was definitely understood between myself and Col. Lyon, when this contract was made, that the property was bought for the railroad Co., but

69 that the title should remain in the oil Co. until it was paid for by railroad Co. When the contract was recorded, about Jan'y 1st, 1886, Col. Lyon claimed the right to pay for this property at any time during the year and cancel the contract, thinking he had about arranged a sale of his road, and this was agreed to by me.

Ans. Int. 11. I do not know.

Answers to Cross-Interrogatories of Holmes Cummins.

Ans X Int. 1. A. M. Littlejohn has written my answers at my direction.

Ans. Int. 2. My understanding of the contract referred to is based,

1st, upon the contract itself and upon the known intention of the two companies when making said contract; also upon the uniform manner in which business has been conducted by and between said companies; 2nd, such understanding was so had from the contract itself; 3rd, both the railway Co. and the oil Co. so understood and the officers of said two companies; 4th, I knew that such was the construction of said contract because it has been thoroughly so understood and acted upon.

Ans. to X Int. 3. Answered by A. M. Littlejohn, and I make his answer mine.

Ans. to X Int. 5. I don't know, but believe they are.

Ans. to X Int. 6. My answers are of my own knowledge, except where I have stated otherwise.

Ans. to X Int. 7. I do not know.

Ans. to X Int. 4. Settlement was had in full between said two companies in August, 1886, at which time the proper receipts and statements were exchanged.

J. T. FARGASON.

Subscribed & sworn to before me this June 8, 1887.
[L. S.] M. B. TREZEVANT,
Notary Public.

70 Ans. Int. 1. A. M. Littlejohn, sec'y & treas.; Clarksdale, Miss. On October 6th, 1883, I was acquainted with the managing officials of the Mobile and Northwestern Railway Company. I knew Colonel Thos. T. A. Lyon, president and gen'l man'g'r of the Mobile and Northwestern Railway, and also knew the managing officials of the Sunflower Oil Co. Mr. J. T. Fargason was president, and myself sec'y & treas. of the Sunflower Oil Co.

Ans. Int. 2. Colonel Lyon occupied the position of pres't & gen. man'g'r of the Mobile & N. W. R. R. from October 6th, 1883, until said road went into the hands of the receiver. Mr. Fargason has been pres't of the Sunflower Oil Co., and myself sec'y & treas. of that company from the date of its organization (July 30th, 1883) up to the present time, except one year'- interim, when Mr. Piper served the Sunflower Oil Co. as its pres't.

Ans. Int. 3. I am and have always been familiar with the contract referred to. Colonel Lyon, the president of the M. & N. W. R. R. Co., opened negotiations with Mr. Fargason for the purchase of certain rolling stock, and these negotiations resulted in the making of this contract and the purchase of the rolling stock therein mentioned.

Ans. Int. 4. I was informed that the railway Co. was financially embarrassed and without funds. It did not have suitable or sufficient rolling stock for the carrying on of its business. They had one locomotive only, which was disabled and not in condition for service and, I was informed, could not be put in running shape
71 for an indefinite or uncertain length of time. I was informed that the purchase of rolling stock was necessary to the con-

tinuation of its business. The rolling stock purchased under said contract has been and is now in daily use by said railroad.

Ans. Int. 5. As an officer of the Sunflower Oil Co. I made myself familiar with the contract entered into with the railway Co., and always construed its meaning to be that said railway Co. were to pay rental on said rolling stock, as specified in the contract, until the end thereof, when the railway Co. were to buy and pay for the rolling stock. I have never thought that any other construction could be placed upon the contract until the matter was mentioned by the receiver. The railway Co. has always known that this construction was placed upon said contract and has at all times held similar views and did acquiesce in such construction.

Ans. Int. 6. I know that the Mobile and Northwestern Railway Co. did give their note, dated Oct. 13, 1883, for the locomotive engine mentioned. The amount of said note was $7,831.80, which was the cost of said engine and interest added thereto. I attach the original note hereto and mark it Exhibit I. On April 15th, 1884, J. T. Fargason & Co. paid as interest on that obligation the sum of $313.27. A renewal note was given, payable Oct. 13th, 1884, for the same sum as the original, viz., $7,831.80. This note was dated April 8, 1884, and I attach it hereto, marked Exhibit 2. On Oct. 16, 1884, J. T. Fargason & Co. advanced as a payment on said
72 last note the sum of $2,600.00. I attach their letter regarding said advance and the continuance of their guarantee on said purchase-money and mark the same Exhibit 3. On the 16th of Oct., 1884, the date of said advance, a new or third note was given for $5,336.44, being for the balance of purchase-money on said engine and interest added thereto, and payable four months after date. This note I also attach hereto and mark same Exhibit 4. This note was protested on Feb'y 20th, 1885, and paid on that day by the said J. T. Fargason & Co., amounting to $5,352.59, with the exchange premium and protest fees added, as noted on the back thereof. The notice of protest is attached to the said note. The sums advanced and paid as principal and interest on the said note and for the purchase of the aforesaid engine Yazoo were all charged to the Sunflower Co. and paid by said company to the said J. T. Fargason & Co. When the said oil Co. paid the said sums the amounts were charged to the said railroad Co.

Ans. Int. 7. The said railroad Co. have been charged on the books of the said oil Co. with all the payments made by the said J. T. Fargason & Co., as mentioned in my answer to Int. 6, with all the purchase-money for the said rolling stock, and with rental at the rate of $1,408.00 per annum, according to the said contract, and with other items as obtained by the said railroad Co. or as paid out for them by the said oil Co.; and, further, the said railroad Co. has been credited on the books of the said oil Co. with the proper credit under said contract for all freights hauled by it for said oil Co. and with all other proper amounts due it by the said oil Co. shown
73 by its charges against the said oil Co., and of which the said oil Co. had any bill or statement rendered to it by said railroad Co., and with other items which the said oil Co. had no means

of verifying by reason of the want of original bills which should have been rendered said oil Co. by said railroad Co. under said contract and which said railroad Co. failed to so render, although repeatedly requested to so render them, and which said unverified amounts to the am't of $2,111.00 the said railroad Co. demanded credit for on a settlement in Aug., 1886 (see Exhibit "A"); and the said railroad Co. was further allowed credit for interest beyond the amount as computed under the said contract as allowable by the said oil Co., and which said amount was claimed by the said railroad Co. in the settlement of Aug., 1886, aforesaid. Statements have always been rendered to said railroad Co., as required of said oil Co., and a full statement of the weight of all cotton seed hauled by it for said oil Co. from Oct., 1883, to the filing of this suit. All of which items are shown in the papers in this case, and which I refer to as part of my answer herein. The said original papers & summaries are marked Exhibits A, B, C. I have no statement now before me as rendered by the said railroad Co., and have only had one such full statement, which was rendered in August, 1886, as aforesaid, a copy, preserved, of which I herewith file, as above stated, as Exhibit A. I am informed that this statement is now on file, with the papers in this case, at Oxford, Miss. On said statement the general items of debit and credit agreed with those of
74 the said oil Co.'s account rendered at the same time, with the exception of the items I have referred to above, and possibly with a difference in this: The rental due by said railroad Co. was computed in the way of interest on the original purchase-money to such date as the said railroad Co. had earned a credit above the amount due as rental or as interest, from which times the said railroad Co. computed the rental as the interest on a new principal, found by deducting the credit in excess of rental due said oil Co. from the original purchase-money paid by said oil Co. This method of computing the rental as interest on a new principal annually was different from the method pursued by the said oil Co., and made a difference in favor of said railroad Co. of $933.87, and was one of the items passed over by the said oil Co. and by them allowed under protest, and in no sense or form admitted to be correct or just; nor was any claim made by said railroad Co. that the said method of computation was allowable or authorized under the said contract. The said oil Co. at that date, in August, 1886, was under the necessity of arriving at an agreed balance as due from said railroad Co. to the said oil Co., and in order to fix and arrive at such balance did pass over and audit incorrect and unverified amounts as claimed by said railroad Co., and did so agree upon a certain amount, to wit, $9,634.24, as due the said oil Co. at that date, and as admitted and agreed to by said railroad Co.; but while passing over and allowing these disputed amounts the said oil
75 Co. persistently denied the right of the said railroad Co. to claim and demand the same and insisted that they allowed the said disputed amounts simply to arrive at an agreed balance and not because they could be claimed under any construction of the said contract, and the said railroad Co. did not so claim them.

Said discrepancy was on our books charged to profit and loss account.

Ans. Int. 8. In August, 1886, the said oil Co. did render to and receive from said railway Co. a full statement & exchange of account inclusive in full of all dealings between said two companies from the said 6th day of October, 1883, up to the date of such statement; said two statements did include *on* both the amounts paid by said oil Co. on and for said rolling stock, the same appearing on the statement of the said oil Co. as a charge against said railroad Co. and on the statement of said railroad Co. as a credit for said oil Co., and a full statement of all amounts claimed as due said railroad Co. for hauling freights and all other services rendered for said oil Co. by said railroad Co. appeared on said statement of said railroad Co. as a debit or charge against said oil Co., and on the statement of said oil Co. these amounts for hauling freight and other services rendered by said railroad Co. appeared as a credit for said railroad Co., and the said two companies did then agree upon said amounts as an offset to each other to the extent of the total debit on the statement of the said statement of railroad Co., cancelling an equal amount of the credits on the same said statement and leaving a balance due said oil Co. of $9,634.24,
76 as shown by said Exhibit A hereto, and the said oil Co. made on its books of account the entries necessary to make them conform to the agreement of balance as then admitted due them by said railroad, to wit, $9,634.24. The said statements were accepted as showing the true balance due said oil Co. at that time by said railroad Co. The said statements were based by both the said companies on the uniform course of dealing adopted by said companies and their understanding of the contract aforesaid from the time of its execution to the said day of settlement, with the exception of the method of computing the rental or interest on the original purchase-money, as I have heretofore noted. The said oil Co. was authorized by the said railroad Co., and subsequently by the order of the U. S. district court herein, as understood by me, to continue its former course of dealings without modification or change, as stated.

Ans. Int. 9. I file herewith, marked Exhibit D, an accurate statement of account from said settlement in Aug., 1886, to the 1st day of May, 1887, showing a balance due said oil Co. by said railroad Co. of ——.

Ans. Int. 10. I am the general managing officer of the Sunflower Oil Co., and was such on the 1st day of January, 1887. Said oil Co. was willing on that day to a further extension of the provisions of said contract as had formerly been had. I was first officially advised by the receiver of said railway Co. of his purpose to re-
77 pudiate, defeat, and deny its contract to purchase said rolling stock by letter dated February 8, 1887. I never at any time understood, considered, or entertained any idea that said contract or any clause or portion thereof conferred upon said railway Co. the right and privilege or option to purchase said rolling stock, as it should determine, on the 1st day of Jan'y, 1886. Said railway Co. never at any time intimated or contended that such was the pur-

pose, force, or effect of said contract, nor did I ever hear such a claim set up or in any manner made until interposed by the said receiver herein as aforesaid.

Ans. Int. 11. In January, 1887, said receiver asked for a reduction in rental to $350.00 per annum on all the rolling stock referred to in said contract hereinbefore mentioned, and said oil Co. has expressed its willingness to this reduction, to take effect from the date of Judge Hill's last order in this case, viz., Jan'y 3, 1887. We were not able to express or put this in writing, in shape, to the receiver; hence no written understanding has been had; but we have made our books to conform to this amount from the 3rd day of Jan'y, 1887, viz., at the rate of $350.00 per annum. We do not intend thereby, however, to waive any of our rights under said contract, except in this particular.

Answers to Cross-Questions of Holmes Cummins.

Ans. to X Int. 1. Mr. Wilberger was the only person present any length of time when I made my answers. Our office
78 is a public place, and his desk is in it. Of course, there was more or less passing in and out. No counsel of either party was present. I have prepared my own answers and written them all out except two, which were written by our book-keeper at my direction.

Ans. to X Int. 2. My understanding of the contract referred to and also the understanding of the company is based, 1st, upon the wording of the contract itself and upon the uniform manner in which both companies have conducted business and acted under the same; 2nd, such understanding was so had from the contract itself and from the known intention of the two companies who drew up said contract, and from the further fact that both companies kept and settled their accounts in the same general way or manner — the railway Co., as heretofore stated at length; 3rd, both the railway Co. and the oil Co. so understood and the managing officers of said two companies; 4th, I know that such was the construction of said contract by said companies because it has been in language time and again so expressed and uniformly acted upon by said two companies, through the managing officers of both companies, ever since its execution.

Ans. to X Int. 3. The original statement made by said railway Co. is, I understand, on file at Oxford; the statements we have are filed, as requested, with my answer to Int. No. 8. My understand-
ing of said statement and settlement is and was based on the
79 fact that at all times when Col. Lyon, managing officer of the railway Co., brought statements to me, as the manager of the oil Co., and particularly when he brought and rendered the statement of August, 1886, he said, and his statement showed, the railway Co. owed the oil Co. for the monies and interest thereon advanced by said oil Co. for the purchase for his Co. of the rolling stock named, and that he desired credit in said amounts for the services rendered said oil Co. by said railway Co., and said credits

were accordingly entered to said railway Co. on our books, as he wished them. Our understanding of the matter was mutual, and our action under said contract was similar. I cannot, of course, remember all that was said and done by us at said times, but the purport, intent, and effect of all conversations and acts was as has been stated.

Ans. to X Int. 4. We rendered said railway Co. monthly (and sometimes more frequently) statements of credits made on their account. At the final settlement, in August, 1886, the accounts of said two companies were exchanged and proper receipts exchanged.

Ans. to X Int. 5. To the best of my knowledge, our statements and replies made in this case are all correct and true.

Ans. to X Int. 6. My answers are of my own knowledge except where I have expressly stated them to be from information, and the source of information in each such case, I believe, was Col. Lyon.

Ans. to X Int. 7. We have had no formal agreement with the receiver in this case regarding said contract or any other matter
80 appertaining to said contract, except *except* as I have stated in answer to direct interrogatory No. 11.

A. M. LITTLEJOHN.

Sworn to & subscribed before me this 25 day of May, 1887.

R. H. WILDBERGER,
Notary Public, C. Co., Miss.

The following are the exhibits referred to in the foregoing deposition:

EXHIBIT No. 1. A. M. Littlejohn.

Ex. No. 1.

$7,831.80. GLENDALE, MISS., *Oct.* 13, '83.

Six months after date we promise to pay to the order of Penaham, Parry, Williams & Co. seventy-eight hundred thirty-one $\frac{80}{100}$ dollars, without defalcation, value received, with current rate of exchange on Phila.

THOS. T. A. LYON,
Pres't M. & N. W. R. R'd Co.

(Endorsed:) Penaham, Parry, Williams & Co.

EXHIBIT No. 3. A. M. Littlejohn.

Ex. No. 3.

MEMPHIS, *Oct.* 16, 1884.

Burnham, Parry, Williams & Co., Philadelphia, Pa.

DEAR SIRS: Referring to our letter of 15 April last, we desire to say, the Mobile & Northwestern R. R. Co. having secured of you extention of their indebtedness to you for the engine "Yazoo" for 4

months on payment of $2,600 (which sum we advance them this day) & condition of our original agreement touching this purchase being unchanged, our guarantee will remain as heretofore.

Yours truly,

J. T. FARGASON & CO.

[Written across face:] Original note.

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EXHIBIT 2. A. M. Littlejohn.

Ex. No. 2.

$7,831.80. MOBILE & NORTHWESTERN RAILROAD CO.,
GLENDALE, COAHOMA CO., MISS., *April* 8, 1884.

On the thirteenth day of October, after date, the Mobile & Northwestern Railroad Company promises to pay to the order of Burham, Perry, Williams & Co., of Philadelphia, for value received, the sum of seven thousand eight hundred and thirty-one $\frac{80}{100}$ dollars, at the Bank of Commerce, in Memphis, Tenn., with current rate of exchange on Philadelphia.

MOBILE & NORTHWESTERN R. R'D CO.,
By THOS. T. A. LYON, *President.*

[Written across face:] Burnham, Perry, Williams & Co. First renewal note.

EXHIBIT 4. A. M. Littlejohn.

Ex. No. 4.

$5,336.44. MEMPHIS, TENN., *October* 16, 1884.

Four months after date the Mobile & Northwestern Railroad Company promises to pay to the order of Burnham, Parry, Williams & Co., of Philadelphia, for value received, the sum of five thousand three hundred and thirty-six $\frac{44}{100}$ dollars, at the Bank of Commerce, in Memphis, Tenn., with the current rate of exchange on Philadelphia, Penn.

THE MOBILE & NORTHWESTERN
R. R'D CO.,
By THOS. T. A. LYON, *President.*

[Written across face:]. Last renewal note for balance due.

(Endorsed:) "Burnham, Perry, Williams & Co. Pay German N. Bank, Memphis, Tenn., ——— ———, Esq., cas'r., or order, for coll. for account of Central National Bank of Philadelphia. Theo. Kitchen, cashier. Received payment of J. T. Fargason & Co. Rob't Kumpf, c'sh of German Nat. B'k.

82 *Protest.*

UNITED STATES OF AMERICA,
State of Tennessee, Shelby County:

Be it known that on the day of the date hereof I, Hunsdon Cary, a notary public of the county of Shelby, in the State of Tennessee, duly commissioned and sworn according to law, and residing in the city of Memphis, in said State, at the request of W. C. McClure, cas. German National Bank of Memphis, Tennessee, the holder, presented at the Bank of Commerce, in Memphis, Tennessee, the original promissory note (it being payable there), whereof a true copy is below written, and demanded payment thereof from the cashier of said bank, and I was answered that the said original promissory note would not be paid.

Whereupon I, the said notary, at the request aforesaid, have and do hereby solemnly protest against the maker of said original promissory note and endorsers and all concerned for all exchange, re-exchange, costs, damages, and interest already suffered and to be suffered for want of payment thereof. Thus done, protested, and recorded, at Memphis aforesaid, this the 19th day of February, one thousand eight hundred and eighty-five.

In testimony whereof I have hereunto set my hand and affixed my seal notarial the day and year above written.

HUNSDON CARY,
Notary Public.

I do hereby certify that, on this the 20th day of February, 1885, I directed a written notice of the above instrument of protest to Burnham, Parry, Williams & Co. and placed the same under
83 cover of a similar notice addressed to the Central National Bank of Philadelphia, Pa., and a special notice to Burnham, Parry, Williams & Co., Philadelphia, Pa., postage paid, and placed the same in the post office at Memphis aforesaid before the departure of any mail.

HUNSDON CARY,
Notary Public.

Fees:

Protest	$1 00
Recording protest	1 00
Postage	05
Notices	75
	2 80

$5,336.44. MEMPHIS, TENN., *October* 16, 1884.

Four months after date the Mobile & Northwestern Railroad Company promises to pay to the order of Burnham, Parry, Williams & Co., of Philadelphia, for value received, the sum of five thousand three hundred and thirty-six $\frac{44}{100}$ dollars, at the Bank of Commerce,

in Memphis, Tenn., with the current rate of exchange on Philadelphia, Penn.

THE MOBILE & NORTHWESTERN
R. R'D CO.,
Per THOS. T. A. LYON, *President.*

Endorsed: Burham, Parry, Williams & Co. Pay German N. Bank, Memphis, Tenn., —— ——, Esq., cashier, or order, for coll. for account of Central National Bank of Philadelphia. Theo. Kitchen, cashier. 14003.

JEFFERSONVILLE, IND., *Nov.* 2, 1883.

Sunflower Oil Co., bought — Ohio Falls Car Company.

5 box cars, Nos. 2, 4, 6, 8, 10, $275		1,375 00
5 flat " " 1, 3, 5, 7, 9, 190.00		950 00
		2,325 00

Via L., E. & So. L. R'y Co. to Helena, Ark.
Received payment Nov. 3, '83.

OHIO FALLS CAR CO.,
By R. M. HARTWELL, *Treas.*

84 $2,325.00. JEFFERSONVILLE, IND., *Nov. 3d*, 1883.

Pay to the order of Ohio Falls Car Co. twenty-three hundred & twenty-five & $\frac{00}{100}$ dollars, acc't of 5 box & 5 flat cars for Sunflow- Oil Co., with exchange on Louisville or New York, value received, and charge the same to account of—

No. 9. 5312.

OHIO FALLS CAR CO.,
By R. M. HARTWELL, *Treas.*

To J. T. Fargason & Co., Memphis, Tenn.

Endorsed: Pay to the order of H. E. Heaton, cash'r. Ohio Falls Car Co., by R. M. Hartwell, treasurer.

Endorsed: Pay C. W. Schulte, cashier, or order, for collection. First National Bank, Jeffersonville, Ind. H. E. Heaton, cashier. Paid.

Report of Seed Received by S. O. Co. via. M. & N. R. R. from Nov. 8, 1883, *to Feb.* 23, 1885.

1883.		lbs.	lbs.
Nov. 8– Dec. 1.	Statement A. B. Coruthers	276,714	
Nov. 26.	W. A. Rainey	3,380	
" 27.	Mitchel Bros.	9,045	
" "	H. C. Montroy	6,800	
" 28.	Mitchell Bros.	3,050	
" 29.	W. A. Rainey	13,300	
" "	Geo. Cross	4,750	
Dec. 1.	W. A. Rainey	13,100	
" 7.	Mitchel Bros.	6,448	

				lbs.	lbs.
1883.					
	Dec.	11.	Mitchel Bros.	9,310	
85	"	11.	T. L. Daner	4,860	
			Total to Dec. 15, 1883		350,757
Dec.	30.		Capt. J. N. Brown	27,470	
			W. W. Shelby	4,958	
			W. A. Rainey	13,534	
			T. L. Daner	1,608	
			P. Green	4,154	
			Mitchel Bros.	10,720	
			F. Richberger	1,742	
			Joe Porter	4,020	
			Mitchell Bros.	7,482	
			T. L. Daner	2,451	
			F. Richberger	1,290	
			Joe Porter	3,096	
			Wm. Rockingham	4,386	
			P. Green	6,490	
			Madison McGary	2,680	
			Total Dec. 15–30, '83		96,081
1884.					
Jan'y	2.		Mitchel Bros.	2,565	
"	"	"	"	3,360	
	3.		—— Richberger	4,455	
	1.		"	5,421	
			Mitchel Bros.	3,750	
			Frank Talbert	2,500	
			Mitchel Bros.	1,730	
"	9.		Michel Bros.	10,248	
			W. A. Rainie, Dec. 18	6,600	
			Forward	40,629	446,838
"	10.		Mitchel Bros.	5,418	
	11.		" "	6,320	
	14.		" "	5,852	
	"		Mitchel Bros.	1,016	
86	15.		" "	2,175	
	"		W. A. Rainey	2,316	
	"		F. Richberger	2,196	
	"		"	5,875	
			Total Dec. 30–Jan'y 15		76,797
	21.		F. Richberger	1,091	
	"		"	6,054	
	22.		P. M. Pickens	11,170	
	"		Mitchel Bros.	5,620	

1884.		lbs.	lbs.
Jan'y 23.	Mitchel Bros.	1,870	
	P. M. Pickens	2,650	
28.	W. H. Storall	25,060	
	Powell Bros.	13,280	
	Mitchell Bros.	2,650	
	Orr & Rainey	1,240	
	W. S. Ganong	2,030	
29.	Mitchell Bros.	5,070	
	Orr & Rainey	740	
	F. Richberger	4,730	
	Powell Bros.	11,810	
	W. S. Ganong	2,350	
30.	Powell Bros.	11,070	
	Total Jan'y 15–31		108,485
Feb'y 1.	W. S. Ganong	2,430	
	Mitchell Bros.	650	
2.	F. Richberger	15,140	
	Powell Bros.	1,730	
	" "	1,990	
	S. S. Birch	10,400	
5.	F. Richberger	900	
	W. S. Ganong	8,250	
	W. A. Rainey	2,470	
87 5.	Mitchell Bros.	1,040	
"	Powell Bros.	2,560	
6.	Mitchell Bros.	16,410	
	Boyd Matthews	4,600	
	W. S. Ganong	4,410	
	Orr & Rainey	3,570	
8.	F. Richberger	2,010	
"	G. B. Matthews	1,190	
	Mitchell Bros.	12,390	
9.	" "	7,630	
12.	" "	31,400	
"	P. M. Perkins	7,350	
"	Orr & Rainey	1,070	
	Jan'y 31–Feb'y 15		139,590
16.	Mitchell Bros.	5,570	
	W. S. Ganong	510	
	M. W. Wilburn	2,030	
18.	Orr & Rainey	2,030	
"	S. S. Birch	5,500	
19.	M. W. Wilburn	2,020	
	Feb'y 15–19th		17,660

1884.			lbs.	lbs.
May	12.	S. S. Birch	23,010	
"	21.	Mitchell Bros.	1,230	
		May 12–June 1		24,240
June	2.	G. W. Butler	1,280	
		Mitchell Bros.	4,550	
		F. Richberger	1,920	
	3.	C. C. Jones	2,300	
	3.	"	1,800	
	4.	J. T. Fargason	9,280	
	6.	Mitchell Bros.	3,300	
	7.	F. H. McGraw	1,510	
	"	Mitchell Bros.	1,650	
88	10.	Mitchell Bros.	1,030	
	"	F. Richberger	2,260	
	"	Peyton Coussin	1,910	
	"	H. C. Montroy	9,240	
	12.	Jackson Matthews	6,830	
	"	J. T. Fargason	24,890	
	13.	"	7,680	
		June 1–15		81,430
	23.	G. W. Warren	3,300	
		R. H. Hayen	23,800	
	26.	H. C. Montroy	4,440	
	30.	"	8,690	
	"	Dr. Bolton	1,710	
		June 15–30		41,940
July	1.	H. C. Montroy	2,570	
	"	"	6,710	
	"	Mitchell Bros.	590	
	"	" "	1,250	
	3.	G. W. Butler	8,750	
		Dr. Bolton	1,450	
		C. C. Jones	3,830	
	7.	Townsend & Orr	4,480	
		C. C. Jones	8,400	
		W. D. Bolton	3,470	
	14.	C. C. Jones	2,780	
		Mitchell Bros.	1,980	
		J. Mathews	4,020	
		W. R. Sadler	3,240	
		Dr. Bolton	1,680	
	15.	Mitchell Bros.	3,050	
	"	G. W. Butler	1,000	

1884.			lbs.	lbs.
July	15.	W. R. Sadler	2,220	
	"	Dr. W. D. Bolton	1,690	
		July 1–15		63,260
89	17.	Dr. W. D. Bolton	1,780	
	18.	" "	1,270	
	19.	G. W. Butler	1,950	
	26.	W. S. Campbell	7,950	
	"	Mitchell Bros.	1,250	
	28.	G. W. Butler	1,650	
	"	Mitchell Bros.	660	
	"	F. Richberger	1,210	
	31.	C. C. Jones	17,670	
	"	Mitchell Bros.	4,360	
	"	F. Richberger	2,240	
	"	Unknown	6,000	
		July 15–31		47,990
Aug.	4.	C. C. Jones	2,310	
	"	Moore & Bolton	1,780	
	"	J. R. Patterson	3,280	
	5.	Geo. Warren	3,750	
		J. R. Patterson	1,910	
		Townsend & Orr	3,600	
		Moore & Bolton	1,790	
		" "	1,630	
		T. H. McGraw	1,900	
		J. R. Patterson	2,020	
	6.	F. Richberger	1,231	
		J. R. Patterson	8,130	
		J. Matthews	1,380	
		J. R. Patterson	3,000	
	11.	J. Matthews	4,610	
		Moore & Bolton	1,400	
		C. C. Jones	1,800	
		"	1,850	
	13.	J. E. Burleson	1,150	
90	13.	C. C. Jones	3,400	
		T. A. Likens	15,140	
		T. A. Likens	52,950	
		Aug. 1–15		120,011
"	18.	C. C. Jones	2,200	
	20.	Townsend & Orr	1,630	
		C. C. Jones	1,120	
	22.	Burleyson, N.	1,210	

1884.			lbs.	lbs.
Aug.	22.	J. E. Burleyson	1,240	
		C. C. Jones	2,500	
	18.	Jno. Alcorn	3,250	
	"	C. C. Jones	2,150	
	25.	Townsend & Orr	2,690	
		J. M. Chrisman	3,170	
		N. A. Burleyson	1,200	
	26.	Townsend & Orr	1,560	
		J. M. Christman	8,420	
	27.	" "	6,600	
		Townsend & Orr	1,640	
	29.	" "	1,810	
		Howell Morris	960	
		T. A. Kyle	1,320	
		J. M. Chrisman	9,800	
		Aug. 15–31st		54,520
Sept.	1.	N. A. Burleyson	2,130	
		J. M. Christman	9,770	
	2.	Dr. Hull	8,910	
	3.	N. A. Burleyson	2,280	
		Geo. Washington	4,870	
	4.	J. G. Richardson	1,800	
		Geo. Washington	7,800	
		J. M. Chrisman	1,440	
91	6.	J. M. Chrisman	1,560	
		Geo. Washington	1,440	
		Mitchell Bros.	500	
		Jno. Grubbs	2,170	
		J. H. Brown	28,970	
	8.	J. R. Richardson	1,467	
		Townsend & Orr	1,693	
	13.	J. E. Barbee	16,106	
		Sept. 1–15th		92,906
	15.	Townsend & Orr	1,360	
		Moore & Bolton	816	
		G. W. Wiley	20,536	
		F. Richberger	2,720	
	16.	G. W. Wiley	2,340	
		C. C. Jones	1,560	
		Steve Manuel	1,040	
	17.	J. K. Jeffries	10,900	
		G. W. Wiley	4,800	
	18.	Geo. Washington	3,216	
		C. C. Jones	1,732	
		Moore & Bolton	938	

1884.			lbs.	lbs.
Sept.	18.	Townsend & Orr	1,072	
	23.	Harvey Hawkes	2,100	
		A. J. Haynes	2,520	
	25.	Bill Philbyrs	1,170	
	26.	Henry Hawkins	3,946	
	27.	Bill Phipps	2,358	
		J. T. Townsend	24,890	
		Nich. Barham	1,834	
		Harvey Hawkes	2,489	
		J. T. Townsend	2,227	
	30.	Jackson Barbee	3,650	
92	30.	J. F. Townsend	1,888	
		Sept. 15–30th		102,102
Oct.	2.	J. F. Townsend	3,210	
		J. C. Furgason	14,396	
	7.	Townsend & Orr	2,032	
		W. Wilburn	1,905	
	10.	H. C. Montroy	11,680	
	13.	G. W. Willey	11,352	
		W. F. Rainey	4,752	
		John Jackson	2,772	
		J. F. Townsend	32,085	
		John Jackson	1,573	
	14.	W. E. Hayen	15,981	
		Oct. 1–15		101,738
Oct.	16.	F. Richberger	1,872	
		H. C. & J. B. Montroy	7,800	
		J. F. Townsend	31,200	
	17.	W. F. Rainey	6,460	
	18.	"	18,320	
	21.	Andrew Collins	3,080	
		Townsend & Orr	5,082	
	22.	Andrew Collins	2,393	
		C. C. Jones	5,104	
	24.	W. F. Rainey	32,256	
		P. M. Perkins	8,640	
	25.	Townsend & Orr	1,305	
		D. C. Perkins	18,850	
		Gilliam & Oliver	3,480	
		Clinch Harris	20,300	
		H. C. & J. C. Montroy	12,180	
		F. Richberger	10,730	
	27.	Townsend & Orr	6,255	
		Clinch Harris	5,421	
93	29.	F. Richberger	2,992	
		Clinch Harris	5,440	

1884.			lbs.	lbs.
Oct.	29.	Townsend & Orr	2,856	
		J. F. Townsend	22,304	
		G. W. Wiley	12,104	
	30.	F. Richberger	2,176	
		Townsend & Orr	2,448	
		Clinch Harris	10,880	
		C. Coof	4,080	
		Oct. 16–30		266,008
	30.	W. F. Clements	1,224	
		Dave Perkins	8,296	
		G. W. Wiley	4,624	
	31.	Dave Perkins	1,913	
		Oct. 30–31		16,057
Nov.	3.	Moore & Gideon	4,587	
		W. E. Hayen	14,039	
		Townsend & Orr	8,062	
		W. F. Rainey	27,800	
		Gilliam & Oliver	4,865	
		Louis Obuna	2,641	
	4.	Townsend & Orr	1,485	
		W. E. Hayen	5,940	
		Clinch Harris	5,670	
		Moore & Gideon	945	
	3.	W. E. Hayen	8,784	
		P. M. Perkins	14,544	
		F. Richberger	2,448	
		Townsend & Orr	5,472	
		Moore & Gideon	4,752	
	5.	Jackson Jones	6,950	
		Andrew Collins	1,807	
94	5.	Clinch Harris	2,363	
		J. P. Townsend	19,043	
		E. A. Lindsley	14,178	
		Moore & Gideon	973	
	6.	J. P. Townsend	13,600	
		W. E. Hayne	11,200	
		Green Robinson	1,088	
		Nov. 3–6		183,236
	6.	Andrew Collins	1,904	
	7.	H. C. & J. B. Montroy	14,175	
		Townsend & Orr	2,025	
	7.	Tom Brougher	1,740	
		Ira Sadler	3,625	

1884.		lbs.	lbs.
Nov. 7.	Townsend & Orr	3,190	
	W. E. Hayen	4,495	
10.	W. F. Wilburn	2,145	
	F. Richberger	4,147	
	Ira Sadler	3,861	
	Townsend & Orr	2,002	
11.	" "	3,180	
	Isaac Fleming	5,300	
12.	F. H. McGraw	1,340	
	Townsend & Orr	2,010	
	W. S. Garrony	2,412	
	Tom Brougher	1,608	
	H. F. Mark	3,618	
13.	P. M. Perkins	11,520	
	Townsend & Orr	1,728	
14.	" "	5,632	
	W. S. Garrony	1,792	
	Clinch Harris	2,560	
	C. C. Jones	2,560	
95 14.	W. E. Hayen	3,200	
	Nov. 6–15		91,769
15.	C. C. Jones	2,235	
	Henry Calloway	3,080	
	T. H. McGraw	3,105	
	Townsend & Orr	2,025	
	W. S. Garrony	3,920	
17.	W. F. Rainey	420	
	"	7,485	
	W. E. Hayen	4,726	
	"	5,769	
	Moore & Gideon	973	
	Tom Brougher	695	
	W. S. Garrony	4,525	
18.	Clinch Harris	5,120	
	T. H. McGraw	1,860	
	Townsend & Orr	1,612	
	H. T. Mark	3,472	
	W. F. Rainey	5,682	
	H. T. Mark	5,835	
	Clinch Harris	5,375	
	T. H. McGraw	4,310	
	H. C. & J. B. Montroy	2,500	
	Townsend & Orr	1,875	
20.	H. C. & J. B. Montroy	4,740	
	C. C. Jones	2,020	
	Townsend & Orr	1,870	
21.	C. C. Jones	2,578	

1884.			lbs.	lbs.
Nov.	21.	C. C. Jones	1,822	
		"	1,633	
		Townsend & Orr	768	
		W. F. Rainey	9,728	
		W. E. Hayen	10,336	
96	21.	Jeff. Porter	11,400	
		W. S. Garrony	7,605	
		J. T. Townsend	12,685	
		Nov. 15–21		143,784
	24.	Moore & Gideon	1,360	
		W. S. Garrony	1,030	
		Bill Alcorn	2,225	
		C. C. Jones	3,908	
		Clinch Harris	12,512	
		Townsend & Orr	2,860	
	25.	Mrs. M. E. Patterson	23,810	
	26.	Townsend & Orr	2,199	
		C. C. Jones	2,340	
	27.	Townsend & Orr	1,375	
		W. S. Garrony	540	
		Dr. J. Hull	4,990	
	28.	M. R. Mitchell	8,650	
		Jas. Mack	3,780	
		Nov. 24–28		71,579
Dec.	1.	R. Douglass	3,570	
		T. H. McGraw	2,950	
		Leroy Wise	13,180	
		W. F. Rainey	9,410	
		L. L. Alcorn	1,935	
		Gilliam & Oliver	3,530	
		C. C. Jones	4,430	
		W. F. Rainey	7,505	
	2.	"	7,600	
		Randall Hall	6,000	
		L. L. Alcorn	1,936	
		T. H. McGraw	2,150	
		W. S. Garrony	1,025	
97	2.	F. Richberger	2,877	
		Sam. Haynes	3,425	
		Dec. 1–2		71,522
	3.	Jackson Jones	4,020	
		Isom Fleming	1,742	
		Randle Hall	4,958	

1884.			lbs.	lbs.
Dec.	3.	J. L. Alcorn	6,566	
		L. M. Garrony	7,370	
	4.	W. S. Garrony	4,575	
		J. Matthews	3,755	
		W. F. Rainey	3,065	
		J. Hull	10,735	
		W. E. Hayne	1,608	
	5.	W. F. Rainey	16,390	
		W. E. Hayne	4,140	
		Ben. Walker	3,245	
		D. C. Perkins	5,550	
		J. Hull	8,325	
		L. M. Garrony	4,865	
		F. H. McGraw	1,275	
		"	2,200	
	8.	L. M. Garrony	8,192	
		M. R. Mitchell	19,456	
		T. H. McGraws	1,474	
		Shade Bros.	2,567	
	9.	Clinch Harris	3,300	
		W. F. Rainey	11,520	
		M. R. Mitchell	9,702	
		L. M. Garrony	5,402	
	10.	L. M. Garrony	2,556	
		W. F. Rainey	2,130	
		W. E. Hayen	4,828	
98	11.	W. E. Hayen	10,292	
		Townsend & Orr	1,512	
		Moore & Gideon	1,170	
		F. Richberger	2,730	
	12.	W. E. Hayen	3,730	
		C. C. Jones	2,410	
		J. Hull	2,650	
		Townsend & Orr	1,690	
		" "	2,420	
		Moore & Gideon	1,300	
	13.	T. H. McGraw	540	
		Gilliam & Oliver	2,430	
		Townsend & Orr	1,485	
		W. E. Hayen	4,454	
		W. F. Rainey	8,190	
	15.	J. Richberger	3,050	
		Townsend & Orr	3,750	
		T. H. McGraw	1,650	
		Dec. 11–15		45,453
	16.	Hargein	2,050	
		Clinch Harris	8,440	

1884.			lbs.	lbs.
Dec.	16.	Townsend & Orr	1,920	
		Clinch Harris	3,550	
		Townsend & Orr	3,692	
		A. Harper	5,538	
		J. Richberger	1,136	
	18.	W. E. Hayen	4,750	
		M. R. Mitchell	13,350	
		J. T. Townsend	12,210	
		A. Harper	1,800	
		Townsend & Orr	2,690	
		Dec. 16–18		61,126
99	18.	Townsend & Orr	3,390	
		G. W. Butler	3,060	
		T. H. McGraw	1,160	
		F. Richberger	1,170	
	20.	Austin Tayler	2,580	
		Townsend & Orr	2,470	
		" "	4,450	
		T. H. McGraw	4,110	
		"	1,320	
		"	1,990	
		M. A. Mitchell	7,190	
	22.	Lee Morrison	3,350	
		Dec. 18–22nd		36,240
	23.	D. C. Perkins	2,670	
		W. E. Hayen	1,170	
		W. A. Rainey	7,400	
		P. M. Perkins	12,110	
		Townsend & Orr	8,160	
		" "	2,400	
		" "	1,080	
		L. L. Alcorn	4,120	
		Lep. Hayen	870	
		C. C. Jones	4,990	
		T. H. McGraw	1,500	
		Moore & Gideon	1,070	
	26.	Townsend & Orr	26,360	
		C. C. Jones	1,600	
		Moore & Gideon	900	
		F. Richberger	1,420	
		J. "	2,090	
		Gilliam & Oliver	640	
100		Dec. 23–26		80,550

			lbs.	lbs.
1884.				
Dec.	26.	M. R. Mitchell	11,364	
		W. E. Hayen	11,560	
		T. H. McGraw	1,520	
	30.	M. R. Mitchell	16,180	
		W. E. Hayen	2,800	
	31.	F. Richberger	2,550	
		Townsend & Orr	9,410	
		Madison Gary	2,310	
		Dec. 26–31		57,694
1885.				
Jan'y	5.	G. W. Butler	3,296	
		Townsend & Orr	4,290	
		" "	1,480	
		W. A. Alcorn	1,870	
	8.	W. E. Hayen	3,330	
		J. T. Townsend	2,150	
		G. W. Butler	2,485	
		Townsend & Orr	2,270	
	12.	D. C. Perkins	12,520	
		Jan'y 5–12		33,691
	13.	L. L. Alcorn	3,990	
		Townsend & Orr	1,430	
		" "	1,060	
		J. B. Brown	3,557	
		"	6,738	
		T. H. McGraw	4,310	
		J. R. Patterson	3,260	
		W. E. Hayen	13,445	
	14.	J. D. Brown	7,236	
	10.	W. E. Hayen	7,605	
		Townsend & Orr	2,090	
		" "	1,840	
		Green Johnson	2,650	
101	10.	J. R. Patterson	8,990	
		Jan'y 13–10		68,201
"	19.	G. W. Butler	1,558	
		J. R. Patterson	1,840	
		G. F. Maynard	880	
	22.	Gus. McDade	3,245	
	26.	C. C. Jones	2,130	
		G. W. Butler	1,700	
		Townsend & Orr	2,270	
		P. Marks	13,470	
	28.	C. C. Jones	3,725	
		" "	3,925	

1885.		lbs.	lbs.
Jan'y 28.	Townsend & Orr	2,678	
	F. Richberger	1,853	
30.	W. E. Hayen	5,163	
31.	A. K. Bobo	5,855	
	" "	1,749	
	" "	1,860	
	Jan'y 19–31		53,901
Feb'y 2.	M. R. Mitchell	2,600	
3.	T. H. McGraw	1,657	
	G. Butler	1,200	
	M. R. Mitchell	4,720	
5.	T. H. McGraw	1,640	
	" J. D. Brown	7,320	
6.	M. R. Mitchell	1,396	
	Townsend & Orr	2,257	
7.	M. R. Mitchell	4,197	
	J. D. Brown	3,437	
	" "	6,126	
	Feb'y 2–7		36,550
10.	M. R. Mitchell	6,003	
102 10.	Townsend & Orr	1,668	
12.	W. E. Hayen	1,066	
14.	Townsend & Orr	1,000	
	P. Marks	15,232	
16.	Townsend & Orr	620	
	G. W. Butler	1,045	
	C. C. Jones	1,744	
	G. Richberger	1,025	
	Feb'y 10–16		29,403
18.	J. M. Chrisman	4,565	
	M. R. Mitchell	1,500	
20.	J. L. Alcorn	76,398	
21.	G. W. Butler	1,720	
	J. M. Chrisman	7,920	
	M. R. Mitchell	3,060	
	C. C. Jones	2,537	
	J. L. Alcorn	113,212	
22.	" "	13,335	
23.	" "	25,261	
	Feb. 18–23		249,508
	Total		3,281,290

Tons, 1,640.6.

E. & O. E.
Feb'y 23d, 1885.

SUNFLOWER OIL CO.
R. H. WILBERGER, *Acc't.*

103 JUNE 1ST, '5.

G. W. Quarles, gen. F. & P. ag't M. & N. W. R. R.

SIR: We have the honor to report seed receipts as follows from May 1st to 31st instant:

May	4.	M. R. Mitchell,	35 sacks	4,470
		J. Richberger,	16 "	1,710
		Green Pettie,	16 "	2,090
		D. M. Russell,	103 "	11,775
	5.	"	153 "	14,025
	6.	M. R. Mitchell,	33 "	4,540
	8.	D. M. Russell,	362 "	37,785
	9.	"	150 "	16,900
	"	P. A. Green,	8 "	1,111
	"	M. R. Mitchell,	16 "	2,370
	"	J. Richberger,	7 "	940
	15.	J. K. Jeffries,	83 "	9,500
		D. M. Russell,	154 "	17,500
		P. A. Green,	10 "	1,490
		For'd		126,216
	16.	J. K. Jeffries,	12 sacks	1,310
		P. A. Green,	10 "	1,510
		J. Richberger,	10 "	1,410
		D. M. Russell,	158 "	17,240
		M. R. Mitchell,	20 "	2,730
		P. A. Green,	5 "	740
	21.	J. K. Jeffries,	34 "	3,660
	23.	W. E. Hogen,	23 "	2,500
		M. R. Mitchell,	34 "	14,716
		Mrs. L. L. Alcorn,	309	42,623
				204,655
		Rec'd previously		3,969,747
		To date		4,174,402

Resp't. submitted.

SUNFLOWER OIL CO.
R. H. W.

104 MAY 5, '5.

G. W. Quarles, G. F. A.:

I have the honor to report seed receipts via M. and N. W. R. R. for Sunflower Oil Co. from April 10th to May 1st, inclusive:

Apr.	20th.	J. K. Jeffries,	92	sacks	11,276
"	22.	"	54	"	6,650
"	22.	M. R. Mitchell,	9	"	1,060
"	25.	D. M. Russell,	126	"	15,361
"	30.	J. Richberger,	26	"	3,290
		Total to May 1st, 1885			37,637
		Received previously			3,932,110
		Total to date			3,969,747

Resp'ct.,

SUNFLOWER OIL CO.,
P'r H. W. C.

4, 15, '5.

G. W. Quarles, gen. F. — P. ag't:

I have the honor to report seed receipts via M. & N. W. R. R. for Sunflower Oil Co. from Mar. 15 to Ap'l 15th, inclusive:

Mar.	16.	F. R. Van Eaton,	117	s'ks	15,450
		M. R. Mitchell,	25	"	3,060
		Mack Barron,	13	"	1,805
"	25.	St'r Ed. Foster,	454	"	122,892
		M. R. Mitchell,	13	"	2,100
		"	13	"	1,386
		"	15	"	1,390
"	28.	St'r Dyersburg,	198	"	28,465
	31.	M. R. Mitchell,	12	"	1,160
		"	12	"	1,290
		St'r Dyersburg,	299	"	45,717
Apr.	1.	M. R. Mitchell,	13	"	1,300
		W. F. Rainey,	71	"	4,421
	4.	D. M. Russell,	134	"	14,375

105

Apr.	7.	D. M. Russell,	100	"	10,820
	10.	J. K. Jeffries,	61	"	7,396
		Total to Apr. 15, 1885			263,027
		Received previously			3,669,083
		Total to date			3,932,110

MAR. 14, '5.

G. W. Quarles, gen. F. & P. ag't M. & N. W. R. R.:

I have the honor to report seed receipts by M. & N. W. R. R. *by* Sunflower Oil Co. from February 15th, 1885, to Mar. 14, inclusive, to wit:

Feb'y 16.	Townsend & Orr,	6	s'ks	
	G. W. Butler,	8	"	1,045
	C. C. Jones,	14	"	1,744
	G. Richberger,	8	"	(?)25
18.	J. M. Chrisman,	30	"	4,565
	M. R. Mitchell,	10	"	1,500
20.	J. L. Alcorn,	633		76,(?)95
21.	G. W. Butler,	15		
	J. M. Chrisman,	61		7,925
	M. R. Mitchell,	32		3,060
	C. C. Jones,	22		
	J. L. Alcorn,			
22.	Do.	110		
23.	Do.	186		
	Feb. 15 to 23, inclusive			253,94(?)
24.	J. L. Alcorn,	573	s'ks	72,756
	J. M. Chrisman,	53	"	6,992
	J. Richberger,	11	"	1,446
	H. S. & J. M. Montroy,	12	"	1,584
26.	J. M. Chrisman,	55	"	6,355

106

Feb'y 28.	J. M. Chrisman,	100	sacks	11,675
	G. W. Butler,	59	"	7,520
	H. C. & J. B. Montroy,	40	"	4,785
	C. C. Jones,	25	"	3,335
	M. R. Mitchell,	8	"	1,070
	J. L. Alcorn,	328	"	38,919
	St'r Ed. Foster,	836	"	172,000
	Feb'y 24–28, inclusive			268,467
Mar. 2.	W. E. Hayen,	26	s'ks	3,145
	C. C. Jones,	13	"	1,959
	M. R. Mitchell,	12	"	1,820
3.	J. L. Alcorn,	409	"	51,534
	C. C. Jones,	20	"	2,203
	"	23	"	3,210
	G. W. Butler,	9	"	1,108
	Townsend & Orr,	26	"	2,335
	M. R. Mitchell,	6	"	890
	En. Moore & Don,	24	"	2,155

Mar.	5.	H. C. & J. B. Montroy,	102 s'ks	12,756
		Jno. Grubbs,	15 "	2,010
	6.	" "	30 "	4,480
		Fannie Hendrix,	28 "	3,920
		H. Mask,	73 "	9,320
		Mar. 2–6th, inclusive		102,845
Mar.	10.	M. R. Mitchell,	17 s'ks	2,250
		J. Richberger,	7 "	360
		C. C. Jones,	7	810
		John Grubbs,	15	2,220
	11.	M. R. Mitchell,	6	786
		Morris Hendon,	24	3,240
		Fannie Hendrix,	8	1,080
		Rec'd Feb'y 26, omitted, W. E. Hayen,	12	1,495
107	Mar.	13. M. R. Mitchell,	15	2,280
		"	10	1,460
Mar. 6–14th, inclusive				16,481
" 2–6, "				102,845
Feb'y 24–28, "				268,467
" 16–23				253,942
Total Feb. 15–Mar. 14, inclusive				641,735
Received previously				3,027,348
Total to Mar. 14, 1885				3,669,083

Resp't.,
SUNFLOWER OIL CO.
R. H. W.
AUG. 13, '6

Seed Received per M. & N. W. R. R. to Date of Sale of S. O. Co.

3.	104, 5 x	13,920
	11	1,420
	46	6,010
	22	2,740
5.	54	6,420
	41	6,220
11.	93	13,020
	91	12,050
	74	9,430
	12	1,560
	26	3,210
12.	29	4,290
	16	2,380
13.	28	3,650
	34	4,430
	9	1,180
		91,930 lb

Prepaid ac.
9—1138

108	3.	D. M. Russell, 160, 5 x	15,120
		" 618, "	63,360
	5.	" 570, "	29,400
	11.	" 41, "	24,530
			132,410 lb
	5.	T. E. Baker, 216, 5 x	25,210
	11.	" 198	24,530
			49,740 lb

R. H. WILBERGER, *Clk.*

8, 5, '6.

Seed Received July, 1886, from M. & N. W. R. R.

		No. sacks.	Wt.	
July	3.	24	2,660	
	6.	32	3,990	
	10.	66	7,790	
	13.	131	15,260	
	15.	74	9,780	
		67	8,080	
	17.	44	5,040	
				52,600
	20.	22	3,380	
		15	1,980	
	26.	61	7,860	
		8	950	
		18	2,060	
		71	7,990	
				30,610
		Total		83,210

D. M. Russell's, and prepaid.

SUNFLOWER OIL CO.
R. H. W.

109 JULY 1ST, '6.

Receipts of C. S. per M. & N. W. R. R. for June, 1886.

	Sax.	Weight.
June 1.	123	15,340
4.	518	66,300
	92	13,940
	140	16,740
	100	10,400
5.	51	6,690
9.	376	47,850
10.	30	3,840
15.	12	1,910

	Sax.	Weight.
June 15.	115	14,170
16.	80	10,220
17.	198	23,750
19.	11	1,530
	37	4,620
	12	1,480
	15	1,810
24.	16	1,760
	8	880
26.	32	3,810
	10	1,240
	Total for June	248,280

6, 1, '6.

Seed Receipts — M. & N. W. R. R., Apr. 21 to May 31st, 1886.

Date.	No. s'x.	Weight.	
Apr. 21.	18	2,120	
21.	25	3,040	
24.	20	2,410	
			7,570
29.	39	5,510	
"	41	5,720	
			11,230
110			
May 6.	38	5,220	
6.	9	1,360	
6.	18	2,720	
6.	9	1,360	
			10,660
17.	48	5,640	
	9	1,050	
	30	3,530	
	10	1,170	
			11,390
25.	15	1,950	
	14	1,540	
	12	1,350	
			4,840
	Total		45,690 lb

SUNFLOWER OIL CO.
R. H. WILBERGER, *Cl'k.*

APRIL 21, '6.

Seed Receipts per M. & N. W. R. R. from March 1, '86, to Close of Run, Apr. 20.

Date.	No. sacks.	Weight.	
M'ch 6.	47	5,110	
	19	2,430	
8.	3	450	
	18	2,700	
	8	1,250	
	Car bulk	-----	18,120
17.	42	5,910	
	100	13,800	
	7	970	
24.	28	3,570	
30.	60	8,130	
Apr. 9.	100	13,120	
9.	34	4,450	
14.	32	4,020	
	34	4,210	
	Total	70,120	18,120

SUNFLOWER OIL CO.
R. H. WILBERGER.

111 MAR. 1, '6.

Seed Receipts per M. & N. W. R. R., Feb., 1886.

Date.	No. sacks.	Weight.	Bulk.
Feb'y 1.	19	3,730	
"	32	4,650	
"	Bulk	-----	18,150
4.	"	-----	8,370
"	19	2,660	
7.	25	3,760	
"	114	-----	13,590
"	Bulk	-----	16,210
12.	91	11,450	
"	18	2,280	
"	11	1,570	
	43	5,320	
	59	7,810	
	15	2,160	
13.	59	6,480	
17.	46	6,990	
	10	1,360	
	17	2,450	
	17	2,340	
	34	4,830	

Date.	No. sacks.	Weight.	Bulk.
Feb'y 17.	25	3,930	
22.	41	6,060	
27.	141	17,340	
	Total for Feb'y, '86	96,170	56,320

SUNFLOWER OIL CO.
R. H. WILBERGER, *Cl'k.*

FEB'Y 1, '6.

112 *Seed Receipts per M. & N. W. R. R., Jan'y*, 1886, *for* ——.

Date.	No. sacks.	Weight.	Bulk.
Jan'y 4.	32	4,640	
	67	8,510	
	9	2,090	
5.	Car 10, bulk	-----	20,160
6.	18	3,080	
	21	3,100	
18.	47	6,480	
	20	2,990	
22.	15	2,170	
	24	3,350	
30.	60	8,480	
	49	6,120	
	12	1,520	
	102	12,570	
	Total for Jan'y, '86	64,100	20,160

SUNFLOWER OIL CO.
R. H. WILBERGER.

Seed Receipts by M. & N. W. R. R., December, 1885.

Date.	No. sacks.	Weight.	Bulk.
Dec. 1.	20	2,180	
	51	5,620	
	67	7,280	
	32	4,060	
	69	9,110	
	41	4,110	
	106	11,820	
	15	2,060	
		———	46,240
	25	3,120	
	12	1,530	
	13	1,850	
	11	1,510	

113

Date.	No. sacks.	Weight.		Bulk.
Dec. 1.	30	4,240		
	13	1,710		
				9,340
	15	2,160		
	39	5,320		
	82	8,790		
	60	7,360		
	100	12,320		
	40	5,380		
	12	1,710		
	49	6,720		
	11	1,640		
	25	3,460		
	50	6,310		
	22	2,970		
	60	7,860		
	137	12,160		
	13	1,890		
	19	2,670		
	67	9,920		
			112,600	
	Forward		158,840	9,340
Dec. 3.	36	5,180		
	45	6,270		
	20	5,780		
	15	1,960		
	31	3,910		
	25	3,130		
	13	1,910		
	51	6,980		
	9	1,210		
	232	26,925		
	41	5,440		
	51	6,650		
			231,185	

114

Dec. 7.	------	------	------	17,880
	168	22,000		
	61	7,960		
8.	------	------	------	18,970
				18,600
9.	23	3,423		
	51	7,395		
			40,778	
12.	139	15,210		
	32	3,740		
	147	19,400		

Date.	No. sacks.	Weight.		Bulk.
Dec. 12.	37	4,510		
	139	20,620		
	105	13,710		
	30	3,920		
			81,110	
16.	18	2,660		
	14	2,110		
19.	7	890		
	7	900		
	22	2,860		
	10	1,470		
	26	3,910		
			14,800	
11.	58	6,340		
	16	2,080		
	14	1,870		
	13	1,680		
	8	1,060		
14.	22	27,310		
	37	5,410		
	16	2,060		
			47,810	
				14,500
				20,150
17.	208	27,580		
115				
Dec. 17.	21	2,810		
	56	5,590		
	13	2,000		
18.	80	10,090		
	27	3,800		
21.	66	8,905		
			60,775	
23.	31	4,010		
	13	1,810		
	23	3,230		
	29	3,830		
	37	4,920		
	122	12,980		
24.	88	9,130		
	19	2,380		
	5	860		
	65	9,540		
	18	2,410		
	12	1,760		
			56,860	
28.	50	6,290		
	225	20,480		
	129	15,310		
			42,080	

Date.	No. sacks.	Weight.		Bulk.
Dec. 29.	53	7,220		
	62	8,260		
	34	4,210		
	157	21,190		
			40,880	
				18,440
				18,130
	15	1,870		
	11	1,520		
	7	1,010		
	71	9,080		
	11	1,400		
			14,880	
	Total for Dec., '85		631,158	136,010

SUNFLOWER OIL CO.
R. H. W.

116 *Seed Received for Oil Co. by M. & N. W. R. R. Co. in Nov.*, 1885.

		S'ks.	Weight.	
Nov. 2.	E. A. Lindsly	60	9,320	
	J. F. Townsend	50	5,740	
	M. R. Mitchell	12	1,780	
	McCain & W.	25	3,640	
				20,480
3.	T. C. Furgason	58	7,120	
	J. K. Jeffries	125	16,620	
	W. A. Rainey	72	8,820	
	Montroys	34	5,430	
	M. R. Mitchell	10	1,520	
				39,510
4.	J. Thompson	41	6,280	
	J. K. Jeffries	40	5,470	
	Van Eaton & Co.	81	11,560	
	W. A. Rainey	63	7,790	
	W. E. Hayen	49	6,690	
	M. R. Mitchell	40	5,930	
	McCain & W.	14	1,870	
	E. A. Lindsley	60	8,830	
	"	30	4,430	
	Applewhite & Co.	33	4,160	
				63,010
5.	J. K. Jeffries	55	7,560	
	E. A. Lindsley	30	4,635	
	"	15	2,215	
	J. F. Townsend	210	23,590	
	Montroys	68	9,480	
	P. A. Green	15	2,240	
	M. A. Mitchell	56	8,210	
				57,930

			S'ks.	Weight.		
Nov.	6.	E. A. Lindsly	57	7,905		
		D. C. Perkins	32	3,435		
		W. A. Rainey	173	22,530		
		M. R. Mitchell	64	9,080		
		McCain & W.	11	1,480		
117						
Nov.	6.	Applewhite & Co.	50	7,160		
					51,590	
		"	--	------	------	18,870
		W. T. Allen	--	------	------	19,850
	9.	J. Thompson	126	18,780		
		T. C. Fergason	170	21,480		
		E. A. Lindsley	226	33,405		
		Wimberly	12	1,780		
		Applewhite & Co.	15	2,170		
					84,875	
	10.	Mitchell	98	14,880		
		J. Thompson	60	8,410		
		Jeffries	20	2,480		
		Lindsley	267	40,345		
		Perkins	11	1,440		
		Wimberly	80	12,210		
		W. F. Rainey	5	760		
					80,525	
	11.	Montroys	82	10,330		
		McCain & W.	71	9,510		
		Mitchell	7	980		
		Lindsley	112	16,630		
		Winston	16	2,310		
		Krasp	100	13,360		
					53,120	
	12.	Mitchell	15	2,230		
		McCain & W.	15	2,160		
		Green	13	1,870		
		Lindsley	98	13,160		
		"	24	3,270		
		Rainey	125	14,320		
		Applewhite	23	2,980		
	13.	Mitchell	17	2,840		
		Rainey	44	5,120		
					47,950	
		Lindsley	34	4,750		
118		Lindsley	20	2,970		
Nov.	13.	Wimberly	18	2,680		
		Allen, bulk	--	------	------	19,390
	14.	Ritchberger	18	2,910		
		Mitchell	16	2,370		
		Perkins	52	6,830		
					22,510	

		S'ks.	Weight.		
Nov. 16.	Mitchell	33	4,670		
	Montroy	16	2,460		
	McCain & W.	16	2,240		
17.	Thompson	71	10,410		
	J. W. Powell	100	12,650		
	McCain & W.	31	4,380		
	Montroy	32	4,300		
	Green	13	2,040		
				33,780	
	Applewhite, bulk	--	------	------	21,670
18.	Mitchell	17	2,210		
	Green	13	2,090		
	Fargason	204	24,380		
				28,680	
19.	Allen, bulk	--	------	------	9,920
	Thompson	75	9,640		
	Fergason	93	8,340		
	Lindsley	83	11,890		
	Rainey	105	12,710		
				42,580	
19.	Mitchell	44	6,270		
	Montroy	34	4,280		
	P. A. Green	17	2,140		
				12,690	
20.	J. Thompson	51	6,140		
	Lindsley	245	34,930		
	Mitchell	123	17,310		
	G. T. Bryant	25	3,410		
				61,790	
21.	Fargason	151	18,110		
	Powell	100	11,920		
	Lindsley	254	35,050		
119					
Nov. 21.	Mitchell	91	13,120		
	Green	14	2,100		
	McCain & W.	16	2,270		
	Richberger	9	1,120		
				83,690	
23.	Thompson	122	14,720		
	Lindsley	67	9,600		
	McGraw	9	1,310		
	McCain	14	1,910		
	Richberger	10	1,420		
	Mitchell	28	3,980		
				32,940	
	Applewhite, bulk	--	------	------	18,840
24.	Thompson	75	10,390		
	Fargason	45	5,490		
	Lindsley	54	6,860		

		S'ks.	Weight.		
Nov. 24.	Green	14	1,960		
	Mitchell	67	9,940		
24.	McCain & W.	81	9,890		
	Green	15	2,310		
	McGraw	13	1,680		
	Hayan	35	4,210		
	Rainey	75	9,680		
				27,770	
26.	Thompson	127	16,270		
	Fargason	90	10,260		
	Lindsley	74	9,610		
	Green	15	2,180		
	McGraw	23	2,980		
	Mitchell	24	3,210		
				44,510	
	Total			933,940	108,540

Respectfully submitted.

SUNFLOWER OIL CO.
R. H. W.

120 *Seed Received via M. & N. W. R. R. by Sunflower Oil Co.*

		Sacks.	W'ts.
Oct. 1.	M. R. Mitchell	29	2,395
	H. C. & T. B. Montroy	20	2,780
	" "	15	2,100
	W. F. Rainey	104	14,558
	T. K. Jeffries	150	23,030
	T. Thompson	73	9,728
	"	82	11,303
	T. K. Jeffries	68	10,224
	W. A. Rainey	63	8,704
	M. R. Mitchell	22	2,935
	H. C. & T. B. Montroy	34	4,782
	McCain & Wise	19	2,748
3.	T. Thompson	40	4,940
	J. F. Townsend	119	14,778
5.	E. A. Lindsley	61	9,105
	"	59	7,630
	T. Thompson	21	2,750
	W. A. Rainey	48	6,285
	J. F. Townsend	158	20,295
	M. R. Mitchell	11	1,665
	P. A Green	15	2,245
	McCain & Wise	47	6,155
6.	J. K. Jeffries	118	16,230
	McCain & Wise	24	4,055
	"	13	2,025

			Sacks.	Wts.
Oct.	7.	J. K. Jeffries	67	9,575
		M. R. Mitchell	34	4,980
		McCain & Wise	9	150
		J. F. Townsend	127	15,750
		Frank ——	29	3,915
				229,155
121				
Oct.	8.	Jesse Norfleet	17	2,530
		J. K. Jeffries	25	3,675
		E. A. Lindsley	48	7,045
		J. F. Townsend	46	5,600
		McCain & Wise	8	1,360
		P. A. Green	15	2,410
		H. C. Montroy	7	1,020
	9.	W. A. Wimberly	54	8,640
		M. R. Mitchell	8	1,210
		J. M. Powell	140	19,110
		W. W. Shelby	60	7,450
	10.	McCain & W.	13	1,980
		E. A. Lindsley	20	3,030
		M. R. Mitchell	59	8,200
	12.	J. Thompson	40	6,370
		J. W. Powell	60	8,330
		M. R. Mitchell	10	1,460
		McCain & W.	35	5,700
	13.	J. Thompson	38	5,230
		J. F. Townsend	123	15,140
		McCain & Wise	18	2,765
		M. R. Mitchell	30	4,455
		L. A. Gillam	7	865
		H. C. Montroy	18	2,445
		Applewhite & Co.	46	6,930
	14.	E. A. Lindsley	11	1,600
		W. A. Rainey	60	8,420
		J. F. Townsend	75	9,250
		M. R. Mitchell	25	3,230
		H. C. Montroy	32	4,510
		McCain & W.	62	9,285
	15.	W. A. Wimberly	175	26,715
122				
Oct.	15.	W. A. Rainey	67	9,080
		M. R. Mitchell	6	700
		W. A. Wimberly	39	5,190
	16.	E. A. Lindsley	42	5,940
		"	16	2,540
		McCain & Wise	73	11,060
		M. R. Mitchell	41	5,860
		Geo. Bryant	46	6,580

			Sacks.	W'ts.	
Oct.	19.	J. Thompson	69	10,805	
	20.	M. R. Mitchell	43	6,280	
		McCain & Wise	17	2,500	
		"	110	15,020	
		M. B. Collins	18	1,855	
		W. A. Rainey	99	12,430	
		W. A. Wimberly	111	16,755	
		G. Bryant	27	3,670	
	22.	J. Thompson	100	16,420	
		E. A. Lindsley	195	28,960	
		"	183	24,740	
		Applewhite & Co.	34	5,325	
		W. A. Wimberly	189	22,085	
	23.	W. F. Rainey	251	30,765	
		W. A. Rainey	111	12,220	
		E. A. Lindsley	31	4,500	
		W. A. Wimberly	154	22,995	
		M. R. Mitchell	111	16,960	
		H. C. Montrory	60	8,160	
		McCain & Wise	23	3,800	
		"	50		
		Forward	--	253,035	
	23.	McCain & Wise	14	1,960	
		Applewhite & Co., bulk	--	------	23,200
123					
Oct.	24.	J. Thompson	34	5,025	
		J. K. Jeffries	285	36,915	
		E. A. Lindsley	211	29,785	
		Geo. Winston	27	4,070	
		E. A. Lindsley	30	4,280	
		W. A. Rainey	29	4,260	
		W. A. Wimberly	75	11,060	
		M. R. Mitchell	39	4,850	
		McCain & Wise	23	3,815	
		W. F. Rainey	275	33,445	
		Geo. Winston	31	4,680	
		E. A. Lindsley	29	4,125	
		"	12	1,690	
		W. A. Rainey	58	7,320	
		W. A. Wimberly	64	9,035	
		J. F. Townsend	161	18,795	
		McCain & Wise	50	7,220	
		M. R. Mitchell	11	1,645	
		Applewhite & Co.	126	17,370	
		W. T. Allen, bulk	--	------	21,970
		W. T. Rainey	79	9,320	
	27.	J. Thompson	70	10,720	
		E. A. Lindsley	20	2,870	

		Sacks.	W'ts.	
Oct. 27.	Geo. Washington	17	2,270	
	McCain & Wise	85	12,730	
	W. A. Wimberly	101	13,230	
	Applewhite & Co., bulk	--	------	9,340
28.	J. Thompson	22	3,360	
	E. A. Lindsley	20	3,360	
	H. Durfee	69	10,855	
			1,033,095	54,510
124				
Oct. 28.	W. A. Rainey	10	1,305	
	J. F. Townsend	58	6,640	
	McCain & Wise	41	6,130	
	M. R. Mitchell	7	1,065	
	W. T. Allen, bulk	--	------	9,740
29.	E. A. Lindsley	10	1,535	
		19	2,805	
		66	10,020	
	W. A. Rainey	60	7,620	
	J. F. Townsend	148	16,465	
	Applewhite & Co.	65	9,510	
	M. R. Mitchell	54	7,820	
	P. A. Green	13	1,965	
	McCain & Wise	12	1,810	
	T. H. McGraw	29	4,140	
	J. Montroy	17	2,380	
30.	Jno. Powell	100	13,610	
	J. K. Jeffries	109	14.180	
	E. A. Lindsley	40	6,090	
		36	5,430	
		28	4,330	
	W. A. Rainey	87	10,910	
	J. F. Townsend	56	6,340	
	W. A. Wimberly	71	10,650	
	Applewhite & Co.	22	3,210	
	"	40	5,310	
	J. W. Montroy	17	2,380	
	"	4	550	
	"	13	1,830	
	McCain & Wise	8	1,270	
	H. C. Montroy	6	835	
	"	5	795	
	"	6	835	
125				
Oct. 30.	M. R. Mitchell	20	3,025	
	P. A. Green	15	2,360	
31.	J. Thompson	156	22,775	
	E. A. Lindsley	27	4,015	
	"	47	7,160	

		Sacks.	W'ts.
Oct. 31.	E. A. Lindsley	11	1,520
	W. A. Rainey	59	7,425
	W. A. Wimberly	51	7,490
	M. R. Mitchell	55	7,780
	McCain & Wise	10	1,535
	F. R. Van Eaton	98	14,340
	M. R. Mitchell	16	2,140
	P. A. Green	15	2,290
	E. A. Lindsley	20	3,940
	"	11	1,570
	W. A. Rainey	45	5,610
	W. E. Hayen	47	6,240
	J. F. Townsend	131	14,260
	Applewhite & Co.	72	10,410
	F. R. Van Eaton		
			1,328,745
	Reported previously		288,592
	To date, lbs.		1,617,337
	Bulk, lbs.		64,250

If it is all the same to you, we would like to have more than one day's notice on a statement of this length and at this season, especially when we wrote you those, to know on what ac'ts you desired statements.

SUNFLOWER OIL CO.
R. H. WILBERGER.

126 *Seed Received by S. O. Co., Season* 1885–'6, *via M. & N. W. R. R.*

		Sax.	Weight.
Aug. 25.	McCain & Wise	14	1,790
	M. R. Mitchell	10	1,490
	W. T. & A. W. Jamison	10	1,330
Sept. 12.	T. E. Rainey	47	5,932
	C. C. Jones	14	1,474
14.	C. B. Danford	140	19,220
19.	C. C. Jones	14	1,476
22.	McCain & Wise	22	3,050
24.	C. B. Danford	26	4,050
	W. F. Rainey	250	37,065
	J. F. Townsend	260	35,925
25.	J. H. Price & Co.	14	2,050
	J. F. Townsend	182	22,838
28.	C. C. Jones	29	4,280
	"	21	3,215
	J. H. Price & Co.	10	1,220
	W. A. Rainey	74	9,890
	Jacob Thompson	149	20,104
	W. A. Rainey	15	1,865
	Geo. Gillam	6	890

		Sax.	Weight.
Sept. 28.	McCain & Wise	10	1,505
29.	J. F. Townsend	146	18,565
	E. A. Lindsley	25	3,500
	W. A. Rainey	75	10,500
30.	Jacob Thompson	29	3,900
	J. K. Jeffries	66	10,295
	E. A. Lindsley	60	7,960
	W. A. Rainey	80	11,038
	J. F. Townsend	299	38,020
	M. A. Mitchell	29	4,155
			288,592

Do you wish report inclusive of the 15th of each month or from 1st to 31st?

Rec'd above list of seed.

SUNFLOWER OIL CO.
R. H. WILBERGER.

127 EXHIBIT "A." 1.

CLARKSDALE, MISS., *Aug.* 21, 1886.

The Mobile & Northwestern R. R. Co. bought of Sunflower Oil Co.

1883.				
Oct. 8.	To cash	(engine)	7,600	
Nov. 5.	"	(cars)	2,325	
1884.				
Feb'y 6.	"		77 37	
7.	"		50	
20.	"	60 cedar posts	30	
May 20.	"		313 27	
Oct. 20.	"	(on engine note)	2,600	
1885.				
Feb'y 17.	"	(bal. on engine note)	5,352 59	
Apr. 6.	"	rental, 1½ years, @ $1,408.00	2,112 00	
1886.				
Apr. 6.	"	" 1 year	1,408 00	
Aug. 21.	"	" April 6 to Aug. 15, @ 1,408 per yr.	469 33	
				22,337 56

CONTRA.

1885.				
Feb'y 23.	By earnings, seed hauled, stat. ren'd		3,281 28	
Apr. 25.	" " " "		680 75	
Aug. 6.	" " passage, "		4 50	
Oct. 26.	" " seed hauled, "		750 81	
Nov. 30.	" " " "		1,617 54	
Dec. 31.	" " " "		1,779 08	
1886.				
Jan'y 31.	" " " "		81 74	
" "	" " mis. fr't hauled, "		2 31	
Feb'y 20.	" " " "		23 60	
" 27.	" " seed hauled, "		145 45	
Apr. 20.	" " " "		100 98	
May 31.	" " " "		50 69	
June 30.	" " " "		248 28	
July 31.	" " " "		83 21	
Aug. 19.	" " " "		91 93	
" "	" interest, 8 %, on monthly surplus, Stat. A		716 30	
" 21.	" earnings for mis. fr't hauled for your %		2,111 00	
" "	" profit & loss allowed to agree on settlement		933 87	
				12,703 32
Agreed bal. due Aug. 21, '86				**9,634 24**

128 EXHIBIT "B." 2.

CLARKSDALE, MISS., *Dec.* 23, 1886.

The Mobile & Northwestern Railroad Co. bo't of Sunflower Oil Co.

1886.				
Aug. 21.	To agreed balance p'r stat. # 1		9,634 24	
" 31.	" rental, Aug. 15th to Aug. 31st		58 66	
Sept. 30.	" " September		117 33	
Oct. 31.	" " October		117 33	
Nov. 30.	" " November		117 33	
	" cash p'r G. W. Quarles		20 00	
				10,064 89

CONTRA.

Aug. 31.	By earnings for seed hauled, stat. ren'd		65 46	
Sept. 30.	" " " "		530 27	
" "	" " mis. fr't hauled, "		19 60	
Oct. 31.	" " " "		14 22	
" "	" " seed hauled, "		629 48	
Nov. 30.	" " " "		931 61	
" "	" " mis. fr't hauled, "		4 90	
Dec. 4.	" " seed hauled, "		214 05	
11.	" " " "		133 71	
18.	" " " "		180 45	
				2,723 75
	Bal. debit			7,341 14

E. & O. E.

Copy of memorandum, stat. rendered Ben. Wilson, rec'r, to this date.

129 EXHIBIT "C." 3.

CLARKSDALE, MISS., *Feb'y 8th*, 1887.

The Mobile & Northwestern R. R. Co. bought of Sunflower Oil Co.

1886.				
Dec. 23.	To balance, statem't ren'd		7,341 14	
" 31.	" rental for Dec., 1886		117 33	
1887.				
Jan'y 31.	" " Jan'y, 1887		117 33	
				7,575 80

CONTRA.

1886.				
Dec. 25.	By earnings for seed hauled, stat. ren'd		153 23	
31.	" " " "		163 84	
1887.				
Jan'y 8.	" " " "		50 58	
" 15.	" " " "		82 42	
" 19.	" " " "		103 99	
" 29.	" " " "		63 10	
Feb'y 5.	" " " "		118 57	
" 1.	" " misc. fr't, Jan., "		76 12	
" 8.	" " seed hauled to date		30 02	
" "	" " misc. fr't "		1 78	
				843 65
	Bal. due S. Oil Co.			6,732 15

130 EXHIBIT D. 4. A. M. Littlejohn.

CLARKSDALE, MISS., *May* 1, 1887.

The Mobile & Northwestern R. R. Co. bo't of Sunflower Oil Co.

Feb'y 8.	To bal. per statement ren'd, #3		6,732 15	
" 28.	" rental, @ 350.00 per annum, for Feb'y, '87		29 17	
" "	" cash, s. d. of Chas. Peterson		15 00	
Mar. 31.	" rental, @ $350.00 per annum, for Mar, '87		29 17	
Apr. 30.	" " @ $350.00 " " Apr., "		29 17	
				6,834 66

CONTRA.

Feb'y 12.	By earnings for seed hauled this mo.		170 14	
19.	" " " " "		77 80	
26.	" " " " "		153 44	
28.	" " mis. fr't "		3 65	
" "	" " seed hauled "		22 19	
Mar. 5.	" " " " "		12 96	
12.	" " " " "		15 81	
19.	" " " " "		38 56	
26.	" " " " "		16 79	
31.	" " misc. fr't "		4 85	
" "	" " seed hauled "		12 60	
Apr. 14.	" " " " "		18 44	
30.	" " " " "		31 32	
" "	" " " " "		56 21	
" "	" " mis. fr't "		26 12	
" "	" overcharges in rental, Jan'y, '87	117 33		
		29 17		
			88 16	
" "	interest on monthly shipment, at 8 %, to Jan'y 1, '87, stat. attached		21 18	
				771 22
	Bal. due Sunflower Oil Co.			$6,063 44

131 *Statement of Interest on Surplus Monthly.*

CLARKSDALE, MISS., *May* 1, 1887.

The Mobile & Northwestern R. R. Co. bought of Sunflower Oil Co.

1886.					
Sept. 1.	Credits for Aug.	$65 46			
" "	Debits " "	58 66			
			6 80	surplus; int., 8 %, 4 mos., to Ju. 1, '87	18
Oct. 1.	Credits " Sept.	549 87			
" "	Debits " "	117 33			
			432 54	surplus; int., 8 %, 3 mos., to Ju. 1, '87	8 65
Nov. 1.	Credits " Oct.	643 70			
" "	Debits " "	117 33			
			526 37	surplus; int., 8 %, 2 mos., to Ju. 1, '87	7 02
Dec. 1.	Credits " Nov.	936 51			
" "	Debits " "	137 33			
			799 18	surplus; int., 8 %, 1 mo., to Ju. 1, '87	5 33
	Total interest allowance				$21 18

Foregoing deposition & exhibits *is* marked "Filed Aug. 9, 1887. G. R. Hill, clerk."

132 *Order of Reference.*

M. H. KATZENBERGER *et al.*
vs.
MOBILE AND NORTHWESTERN RAILROAD *et al.*

This day comes on to be heard the above-entitled cause on the petition of The Sunflower Oil Mill Co. *vs.* Wilson, receiver, and on the answer, cross-petition, and answer thereto, and on the exhibits and proofs and agreement of counsel; and the court, being satisfied in the premises, doth order, adjudge, & decree as follows, to wit:

1. That the said petition and all the subsequent proceedings & proofs be, and the same are hereby, referred to Samuel C. Lane, commissioner of this court, with instructions to take and state the following accounts: First, an account between the said oil mill company and the said railroad company, showing the amount due from the oil mill company to the railroad company for freights at the end of each month, from the 6th day of October, 1883, to the 1st day of January, 1887 (as specified in the contract of 6th Oct., 1883), to be credited each month with the sum of $117.33\frac{1}{3}$, the monthly rental of said rolling stock. If the rent for a month exceed the freights for that month or if the freights for a month exceed the rents for that month the balance of excess either way is to draw interest to 1st Jan'y, 1887, at 8% per annum, which the commissioner shall compute. Said account shall also show the general balance due by the one party or the other on the 1st day of January, 1887, being the summation of all the monthly balances aforesaid and of the
133 interest thereon. In stating said account the said commissioner is also, if the oil company so desires, to take proof as to the condition of the said engines, tenders, & cars on the 1st day of Jan'y, 1887, and give the said oil company credit for such amount of money, if any, as would on that day have been necessary to put the same in good order, not including, however, in such computation any estimate for the ordinary deterioration of usual wear & tear. Secondly, an account between the said oil mill company and the receiver in this cause, showing the amount due by the said company to the receiver for freights earned month by month, as above directed, and credited with monthly rents, as above stated, at the rate of $117.33\frac{1}{3}$ per month, until the date when the said company and the receiver made a contract for a lower rental, and from that date at the rate so contracted for, and showing the general balance, with interest computed; all as directed in respect to the final account.

2. In stating such accounts the commissioner may use the evidence already taken in this branch of this cause and may take such further testimony as he shall deem necessary.

3. Said commissioner shall report his action hereunder, so soon as he can do so, to this court.

Ordered, adjudged, & decreed this 12th Aug., 1887.

R. A. HILL, *Judge.*

Filed & entered M. 11, p. 285, Aug. 12, 1887.
G. R. HILL, *Clerk.*

And afterwards, to wit, on 15 Nov., 1887, the following account between the receiver & oil Co. was filed, to wit:

134 UNITED STATES OF AMERICA,
Northern District of Mississippi:

In the District Court of the United States for the Western Division of the Northern Judicial District of Mississippi. In Equity.

M. H. KATZENBERGER *et al.*
vs.
MOBILE & NORTHWESTERN R. R. Co. *et al.* } No. 336.

To the Hon. R. A. Hill, judge of said court, sole presiding:

The undersigned commissioner, to whom was referred this cause, by decree had thereon on the 12th day of August, 1887, to take and state an account between the Sunflower Oil Mill Company and Ben. Wilson, the receiver, according to the directions contained in the second paragraph of said decree, begs leave to submit the following statement of account:

Sunflower Oil Mill Co. in Account with Ben. Wilson, Receiver of M. & N. W. R. R. Co.

1887.				
Jan'y	31.	To freight earnings for January, 1887	376 21	
"	"	By rental, @ $350 per annum, for January, 1887		29 17
"	"	To int., @ 6%, on $347.04, bal., from this date to 15th Nov., 1887	15 63	
Feb'y	28.	To freight earnings for February, 1887	577 59	
"	"	By rental " " "		29 17
"	"	" s. d. Chas. Patterson, engineer, cashed		15 00
"	"	To int., @ 6%, on $533.42, from this date to 15 Nov., 1887	22 66	
M'ch	31.	To freight earnings for March, 1887	101 57	
"	"	By rental " " "		29 17
"	"	To int., @ 6%, on $72.40, bal., from this date to 15 Nov., 1887	2 53	
April	30.	To freights earned for April, 1887	133 09	
"	"	By rentals " " "		29 17
"	"	To int., @ 6%, on $103.92, bal., from this date to 15 Nov., 1887	3 37	
May	31.	To freight eearnings for May, 1887	727 01	
"	"	By rental " " "		29 17
"	"	To int., @ 6%, on $697.84, bal., from this date to 15 Nov., 1887	19 19	
		By am't to balance (for'd)		1,818 00
			1,978 85	1,978 85
1887.		135 To balance bro't for'd	$1,818 00	
June	30.	To freights earned for June, 1887	139 99	
"	"	By rental " " "		29 17
"	"	To int., @ 6%, on $110.82, bal., from this date to 15 Nov., 1887	2 21	
July	31.	To freights earned for July, 1887	168 35	
"	"	By rental " " "		29 17
"	"	To int., @ 6%, on $139.18, bal., from this date to 15th Nov., 1887	2 08	

1887.				
Aug.	31.	To freights earned for Aug., 1887	92 67	
"	"	By rental " " "		29 17
"	"	To int., @ 6%, on $63.50, bal., from this date to 15 Nov., '87	78	
Sept.	30.	To freights earned for Sept., 1887	326 34	
"	"	By rental " " "		29 17
"	"	To int., @ 6%, on $297.17, bal., from this date to 15th Nov., '87	2 22	
Oct.	31.	To freight earnings for Oct., 1887	1,264 15	
"	"	By rental " " "		29 17
"	"	To int., @ 6%, on $1,234.98, bal., from this date to 15th Nov., 1887	3 05	
Nov.	3.	To freight earnings to this date, this month	109 01	
"	"	By rental from 1st to 3 Nov., 1887		2 94
		By am't to balance		3,780 06
			3,928 85	3,928 85
1887.				
Nov.	15.	To balance due receiver this day	$3,780 06	

From the foregoing account your commissioner finds that on the 15th day of November, 1887, the said Sunflower Oil Company was indebted to Ben. Wilson, the receiver in this cause, in sum of three thousand seven hundred eight & $\frac{6}{100}$ dollars balance; and now, having complied with the requirements of said decree in this behalf, prays to be hence discharged.

Respectfully submitted.

SAM. C. LANE,
Commissioner.

This 15th Nov., 1887.

Filed Nov. 15th, 1887.

G. R. HILL, *Clerk.*

136 And afterwards, on the 3 Dec., 1887, the commissioner filed his report & statement of account between the railroad & oil company, which is in the words & figures following, to wit:

Account Between R. R. Co. & Oil Co.

In the District Court of the United States for the Western Division of the Northern Judicial District of Mississippi.

M. H. KATZENBERGER *et als.*
vs.
MOBILE & NORTHWESTERN RAILROAD CO. *et al.* } No. 336.

SUNFLOWER OIL CO., Petitioner,
vs.
MOBILE & NORTHWESTERN R. R. CO. *et al.*, Respondent.

To the Honorable R. A. Hill, judge of said court, sole presiding:

The undersigned, your commissioner, to whom this cause was referred by decree of said court of August 12, 1887, to take and state an account between said railroad company and said oil com-

pany showing the amount due from the said oil company to the railroad company for freights at the end of each month from the 6th Oct., 1883, to the 1st January, 1887, the oil company to be credited each month with the monthly rental of certain rolling stock at $117.33⅓, and interest at 8% per annum to be debited or credited, as the case may be, on the balance for each month, being the difference between the freight & rental, to the 1st January, 1887, and having given the respective parties ample notice that such account would be taken and stated at the clerk's office of said court on the 11th day of November, 1887, begs leave to make and state and submit the following account, to wit:

137 In the District Court of the United States for the Western Division of the Northern District of Miss.

OXFORD, MISS., *No.* 11, 1887.

Sunflower Oil Company in Account with the Mobile & Northwestern Railroad Company.

1883.				
Oct.	31.	To freights for this mo.	115 80	
"	"	By rents " " "		117 33⅓
"	"	" int. on $1.53, bal., @ 8%, from 6 Oct., 1886, to 1st Jan'y, 1887, 38.71 mo.		38
Nov.	30.	To freights for this mo.	574 29	
"	"	By rents " " "		117 33⅓
"	"	To int. on $456.96, bal., @ 8%, to 1st Jan'y, '87, 37.71 mo.	114 87	
Dec.	31.	To freights for this mo.	336 80	
"	"	By rents " " "		117 33⅓
"	"	To int. on $219.47, bal., @ 8%, to 1st Jan'y, '87, 36.71 mo.	53 71	
1884.				
Jan'y	31.	To freights for this mo.	473 53	
"	"	By rents " " "		117 33⅓
"	"	To int. on $356.20, bal., @ 8%, to 1st Jan'y, '87, 35.71 mo.	84 79	
Feb'y	28.	To freights for this mo.	311 75	
"	"	By rents " " "		117 33⅓
"	"	To int. on $194.42, bal., @ 8%, to 1st Jan'y, '87, 34.71 mo.	44 98	
M'ch	31.	To freights for this mo.	61 75	
"	"	By rents " " "		117 33⅓
"	"	" int. on $55.58, bal., @ 8%, to 1st Jan'y, '87, 33.71 mo.		12 48
Apr.	30.	To freights for this mo.	20 00	
"	"	By rents " " "		117 33⅓
"	"	" int. on $98.33, bal., at 8%, to 1st Jan'y, '87, 32.71 mo.		21 09
May	31.	To freights for this mo.	145 14	
"	"	By rents " " "		117 33⅓
"	"	To int. on $27.81, bal., @ 8%, to 1st Jan'y, '87, 31.71 mo.	5 86	
June	30.	To freights for this mo.	446 07	
"	"	By rents " " "		117 33⅓
"	"	To int. on $328.74, bal., @ 8%, to 1st Jan'y, '87, 30.71 mo.	67 31	
		By am't to balance (for'd)		1,766 70
			2,856 65	2,856 65

1884.	138	To balance bro't for'd		$1,766 70	
July 31.		To freights for this mo.		124 65	
" "		By rents for this mo.			117 33⅓
" "		To int. on $7.32, bal., @ 8 %, to 1st Jan'y, '87, 29.71 mo.		1 44	
Aug. 31.		To freights for this mo.		218 13	
" "		By rents " " "			117 33⅓
" "		To int. on $100.80, bal., @ 8 %, to 1st Jan'y, '87, 28.71 mo.		19 29	
Sept. 30.		To freights for this mo.		295 46	
" "		By rents " " "			117 33⅓
" "		To int. on $178.13, bal., @ 8 %, to 1st Jan'y, '87, 27.71 mo.		32 90	
Oct. 31.		To freights for this mo.		400 35	
" "		By rents " " "			117 33⅓
" "		To int. on $283.00, bal., @ 8 %, to 1st Jan'y, '87, 26.71 mo.		50 44	
Nov. 31.		To freights for this mo.		500 72	
" "		By rents " " "			117 33⅓
" "		To int. on $383.39, bal., @ 8 %, to 1st Jan'y, '87, 25.71 mo.		65 71	
Dec. 31.		To freights for this mo.		533 70	
" "		By rents " " "			117 33⅓
" "		To int. on $416.37, bal., @ 8 %, to 1st Jan'y, '87, 24.71 mo.		68 58	
1885.					
Jan'y 31.		To freights for this mo.		249 84	
" "		By rents " " "			117 33⅓
" "		To int. on $132.51, bal., @ 8 %, to 1st Jan'y, '87, 23.71 mo.		20 94	
Feb'y 28.		To freights for this mo.		680 10	
" "		By rents " " "			117 33⅓
" "		To int. on $562.77, bal., @ 8 %, to 1st Jan'y, '87, 22.71 mo.		83 30	
M'ch 31.		To freights for this mo.		447 94	
" "		By rents " " "			117 33⅓
" "		To int. on $330.61, bal., @ 8 %, — 1st Jan'y, '87, 21.71 mo.		47 84	
April 30.		To freights for this mo.		183 72	
" "		By rents " " "			117 33⅓
" "		To int. on $63.39, bal., @ 8 %, to 1st Jan'y, '87, 20.71 mo.		9 15	
May 30.		To freights for this mo.		212 50	
" "		By rents " " "			117 33⅓
" "		To int. on $95.17, bal., @ 8 %, to 1st Jan'y, '87, 19.71 mo.		12 50	
		By am't to balance (for'd)			4,735 23⅓
				6,025 90	6,025 90
1885.	139	To balance bro't for'd		4,735 23⅓	
June 30.		To freights for this mo.		313 39	
" "		By rents for this mo.			117 33⅓
" "		To int. on $196.06, bal., @ 8 %, to 1st Jan'y, '87, 18.71 mo.		24 45	
July 31.		To freights for this mo.		265 69	
" "		By rents " " "			117 33⅓
" "		To int. on $148.36, bal., @ 8 %, to 1st Jan'y, '87, 17.71 mo.		17 51	
Aug. 31.		To freights for this mo.		125 47	
" "		By rents " " "			117 33⅓
" "		To int. on $8.14, bal., at 8 %, to 1 Jan'y, '87, 16.71 mo.		90	
Sept. 30.		To freights for this mo.		355 35	
" "		By rents " " "			117 33⅓
" "		To int. on $238.02, bal., @ 8 %, to 1st Jan'y, '87, 15.71 mo.		24 86	

1885.				
Oct.	31.	To freights for this mo.	1,464 17	
"	"	By rents " " "		117 33⅓
"	"	To int. on $1,346.84, bal., @ 8 %, to 1st Jan'y, '87, 14.71 mo.	132 08	
Nov.	30.	To freights for this mo.	1,191 92	
"	"	By rents " " "		117 33⅓
"	"	To int. on $1,074.59, bal., @ 8 %, to 1st Jan'y, '87, 13.71 mo.	98 20	
Dec.	31.	To freights for this mo.	875 78	
"	"	By rents " " "		117 33⅓
"	"	To int. on $758.45, bal., @ 8 %, to 1st Jan'y, '87, 12.71 mo.	64 28	
1886.				
Jan'y	31.	To freights for this mo.	168 46	
"	"	By rents " " "		117 33⅓
"	"	To int. on $51.63, bal., @ 8 %, to 1st Jan'y, '87, 11.71 mo.	4 08	
Feb'y	28.	To freights for this mo.	209 85	
"	"	By rents " " "		117 33⅓
"	"	To int. on $92.53, bal., @ 8 %, to 1st Jan'y, '87, 10.71 mo.	6 61	
M'ch	31.	To freights for this mo.	107 60	
"	"	By rents " " "		117 33⅓
"	"	By int. on $9 72, bal., @ 8 %, to 1st Jan'y, '87, 9.71 mo.		63
April	30.	To freights for this mo.	51 48	
"	"	By rents " " "		117 33⅓
"	"	By int. on $63.85, bal., @ 8 %, to 1 Jan'y, '87, 8.71 mo.		3 61
		By am't to balance (for'd)		8,942 45⅔
			10,237 36⅓	10,237 36⅓
1886.	140	To balance bro't for'd	8,942 45⅔	
May	31.	To freights for this mo.	81 49	
"	"	By rents for this mo.		117 33⅓
"	"	" int. on $35.84, bal., @ 8 %, to 1st Jan'y, '87, 7.71 mo.		1 83
June	30.	To freights for this mo.	265 06	
"	"	By rents " " "		117 33⅓
"	"	To int. on $147.73, bal., @ 8 %, to 1st Jan'y, '87, 6.71 mo.	6 60	
July	31.	To freights for this mo.	85 06	
"	"	By rents " " "		117 33⅓
"	"	" int. on $32.27, bal., @ 8 %, to 1st Jan'y, '87, 5.71 mo.		1 22
Aug.	31.	To freights for this mo.	175 66	
"	"	By rents " " "		117 33⅓
"	"	To int. on $58.33, bal., @ 8 %, to 1st Jan'y, '87, 4.71 mo.	1 82	
Sept.	30.	To freights for this mo.	549 87	
"	"	By rents " " "		117 33⅓
"	"	To int. on $432.54, bal., at 8 %, to 1st Jan'y, '87, 3.71 mo.	10 72	
Oct.	31.	To freights for this mo.	643 70	
"	"	By rents " " "		117 33⅓
"	"	To int. on $526.37, bal., @ 8 %, to 1st Jan'y, '87, 2.71 mo.	9 50	
Nov.	30.	To freights for this mo.	936 51	
"	"	By rents " " "		117 33⅓
"	"	To int. on $819.18, bal., @ 8 %, to 1st Jan'y, '87, 1.71 mo.	9 35	
Dec.	31.	To freights for this mo.	845 38	
"	"	By rents " " "		117 33⅓

1886.				
Dec. 31.	To int on $728.05, bal., from 6 Dec., '86, to 1st Jan'y, '87, .71 mo.		3 44	
	By am't to balance			11,624 90
			12,566 61⅔	12,566 61⅔
1887.				
Jan'y 1.	To bal. due R. R. Co. on this date		11,624 90	
1884.				
Nov. 1.	By payment, $80.38; int. @ 8 % thereon to 1st Jan'y, '87, $13.92			94 31
" "	By payment, $250.00; int. @ 8 % thereon to 1st Jan'y, '87, $58.32			308 32
Feb'y 6.	By payment, $77.23; int. @ 8 % thereon to 1st Jan'y, '87, $17.93			95 16
" "	By payment, $50.00; int. @ 8 % thereon to 1st Jan'y, '87, $11.60			61 60
May 20.	By payment, $313.27; int. @ 8 % thereon to 1st Jan'y, '87, $65.45			378 72
	By am't to balance (car'd for'd)			10,686 79
			11,624 90	11,624 90
1884. 141	To balance bro't for'd		10,686 79	
Feb'y 20.	By payment, $30.00; int. @ 8 % thereon to Jan'y 1, '87, $6.87			36 87
1885.				
July 1.	By payment, $125.00; int. @ 8 % thereon to Jan'y 1, '87, $15.00			140 00
Aug. 1.	By payment, $125.00; int. @ 8 % thereon to Jan'y 1, '87, $14.16			139 16
	By am't to balance			10,370 76
			10,686 79	10,686 79
1887.				
Jan'y 1.	To bal. due R. R. Co. on this day		10,370 76	
1885.				
July 17.	By cash, being interest and protest fees on note for $5,000 of the Mobile & North W. R. R., taken up by J. T. Fargason & Co. & by contract collected of S. O. Co.	$352 59		
" "	To int. on this am't, at 8 %, to Jan'y 1, '87	53 62		
				406 21
1886.				
Nov. 30.	To cash paid G. W. Quarles, sup't	20 00		
" "	" int. on this am't, @ 8 %, to Jan'y 1, '87	14		
				20 14
				9,944 41
			10,370 79	10,370 79
1887.				
Jan'y 1.	To balance due R. R. Co. on this day		$9,944 41	

And your commissioner, believing now that he has fully complied with all the requirements in said decree in this behalf, prays hence to be discharged with his reasonable fee.

Respectfully submitted.

SAM. C. LANE,
Special Commissioner.

Filed & entered Dec. 3d, 1887.

G. R. HILL, *Clerk.*

And afterwards, on the 7 Jan'y, 1888, a motion was entered in said cause, which is in the words & figures following, to wit:

142 *Motion to Strike from Files Cross-Petition.*

M. H. KATZENBERGER *et als. v.* M. & N. W. R'Y CO. *et als.*

In Re the Petition of THE SUNFLOWER OIL CO. *against* RECEIVER.

Now comes the petitioners before final decree herein and move the court to strike from the files the cross-petition of the receiver and to grant him no relief as prayed for therein, for the reasons following, to wit:

1. Because said receiver, in the decree of this court making appointment of and defining the powers of said receiver, is not authorize- nor empowered to sue for nor maintain any action or petition for the recovery of nor to receive any moneys due, accruing, or belonging to said Mobile & Northwestern Railway Company prior to the time of his appointment, and the petition of said receiver herein seeks so to do.

2d. Because said petition seeks to recover for the earnings of the M. & N. W. R'y Co. not covered by the mortgage described in the original bill filed herein praying for the appointment of said receiver, and which — said receiver nor the bondholders under said mortgage is entitled to have.

3d. Because it appears under the proofs filed herein that said cross-petition seeks to recover for the earnings of said M. & N. W. R'y Co. for services performed before the appointment of said receiver, all of which said earnings had, before the appointment of said receiver, been otherwise & in good faith collected, paid out, applied, and fully disposed of, and neither said receiver nor said bondholders is now entitled to have or recover back the same.

4th. And other causes to assign at the hearing.

CUTRER & CUTRER,
Sol's for S. O. Co.

Filed Jan'y 7th, 1888.

G. R. HILL, *Clerk.*

143 And, to wit, on said 7th Jan'y, 1888, a final decree was had in said cause, which is in the words & figures following, to wit:

Final Decree.

M. H. KATZENBERGER *et als.*
vs.
THE MOBILE & NORTHWESTERN RAILROAD COMPANY *et als.*

Be it remembered that on this day came on to be heard the above-entitled cause on the petition of the Sunflower Oil Company and the cross-petition of Benjamin Wilson, receiver, and all other the pleadings and the exhibits and the proofs thereunto appertaining, and on the motion of the said oil company to dismiss said cross-pe-

tition, and on the report of Sam. C. Lane, special commissioner hereinbefore appointed on the 12th day of August, 1887, by the court's decree of that date, to take & state an account of the moneys due by the said oil company to the said Mobile & Northwestern Railroad Company for freights earned before the appointment of said receiver, and on the motion of the receiver for confirmation of said report; and the court, being satisfied in the premises, doth order, adjudge, and decree as follows:

1. That the motion of the said oil company to dismiss the cross-petition of the said receiver be, and the same is hereby, overruled.

2. That the report of Samuel C. Lane, special commissioner hereinbefore appointed as aforesaid to take & state an account of the moneys due to the said railroad company by said oil company on account of freights earned prior to the appointment of said receiver, showing that the amount so earned *is*, with interest to the 1st
144 day of January, 1887, was & is the sum of nine thousand nine hundred forty-four & $\frac{41}{100}$ dollars, be, & the same is hereby, in all respects approved & confirmed.

3. That the said Sunflower Oil Company do pay at once to the said Benjamin Wilson, receiver of the Mobile & Northwestern Railroad Company, the said sum of nine thousand nine hundred and fourty-four $\frac{41}{100}$ dollars, and the further sum of six hundred and six dollars, interest thereon to date, making ten thousand five hundred fifty & $\frac{41}{100}$ in all, for which and the costs herein adjudged against said oil company let execution issue.

4. That the costs of this branch of this cause be borne equally by the said oil company and said receiver.

5. That Holmes Cummins and Edward Mayes, solicitors, be allowed their fees out of said moneys so payable, as follows: To each of said solicitors the sum of seventeen hundred and seventy-three $\frac{41}{100}$ dollars, with interest from this date, and said fees are hereby declared a paramount charge on said fund; and the said Sunflower Oil Company in open court prayed an appeal to the supreme court, which is granted, the same to operate as a supersedeas when the said oil company shall file, as required by law, a bond, conditioned according to law, in the penal sum of fourteen thousand dollars.

Ordered, adjudged, & decreed this the 7th day of January, 1888.

R. A. HILL, *Judge.*

Filed & entered 7 Jan'y, 1888.

G. R. HILL, *Clerk.*

145 And, to wit, on said 7 Jan'y, 1888, another final decree was entered in said cause, which is as follows, to wit:

M. H. KATZENBERGER *et als.*

vs.

THE MOBILE & NORTHWESTERN RAILROAD CO. *et als.*

This day came on to be heard the above-entitled cause on the decrees hereinbefore rendered, and on the report of Samuel C. Lane, special commissioner, hereinbefore appointed to take and state an

account of the amount due by the Sunflower Oil Company to Benjamin Wilson, receiver herein, of the moneys due said receiver for freights hauled by him since his appointment herein as receiver; and the said report showing said amount to be the sum of thirty-seven hundred and eighty $\frac{6}{100}$ dollars due 15th Nov., 1887, and the said report having been by the parties in open court agreed to be credited with the sum of seventy-one dollars $\frac{22}{100}$, and, the court being satisfied in the premises, it is therefore ordered, adjudged, & decreed that the said report, showing as credited the sum of $3,709.28 due on the 15th Nov., 1887, be, and the same is hereby, confirmed; and, secondly, that the said Sunflower Oil Company do forthwith pay to said Benjamin Wilson, receiver of the Mobile & Northwestern Railroad Company, the sum of thirty-seven hundred twenty-nine & $\frac{82}{100}$ dollars and the costs of this decree and of execution, for which let execution issue; and it is further ordered that the petition of
146 the said Sunflower Oil Company herein be dismissed at the mutual cost of said receiver and said oil company, as hereinbefore in this cause decreed. Whereupon the said company in open court prayed an appeal to the supreme court, which is granted, the same to operate as a supersedeas when the said oil company shall file, as required by law, a bond, conditioned according to law, in the penal sum of five thousand dollars.

Ordered & decreed this 7 day of January, 1888.

R. A. HILL, *Judge.*

Filed & ent. Jan. 7, 1888.

G. R. HILL, *Clerk.*

Afterwards, on the 28 January, 1888, said petitioners filed their two appeal bonds herein, which are in the words & figures following, to wit:

Appeal Bond to First Decree for $9,944.41.

THE STATE OF MISSISSIPPI:

In the United States Court for the Western Division of the Northern District of said State.

M. H. KATZENBERGER *et als.*
vs.
THE MOBILE AND NORTHWESTERN RAILWAY CO. *et als.*

In the Matter of the Petition of THE SUNFLOWER OIL COMPANY
against
THE RECEIVER IN SAID CAUSE.

Appeal bond.

Know all men by these presents that we, The Sunflower Oil
147 Company, as principal, and The Greenville Oil Works, as sureties, are held and firmly bound unto Benj. Wilson, the receiver of the Mobile and Northwestern Railway Company in the above-entitled cause, in the penal sum of fourteen thousand dol

lars; to make which payment we bind ourselves hereby jointly and severally.

Witness our hands this the 25 day of January, A. D. 1888.

The condition of the above obligation is such that whereas the above-bound Sunflower Oil Company was, at the prayer of the cross-petition of the said Benj. Wilson, receiver of the said Mobile and Northwestern Railway Company, heretofore filed in answer to the original petition of the said Sunflower Oil Company hereinbefore exhibited against said Wilson, receiver as aforesaid, by the decree of the United States district court for the western division of the northern district of Mississippi, on the 7th day of January, A. D. 1888, adjudged and decreed to pay to the said Benj. Wilson, the said receiver of said railway, the sum of nine thousand nine hundred and forty-four & $\frac{41}{100}$ —, together — the further sum of six hundred and six dollars, interest thereon to said date, making ten thousand five hundred and fifty and $\frac{41}{100}$ dollars in all, and one-half of the costs accrued and accruing from the filing of said original and cross petitions and the proceedings thereunder, from which said decree the said Sunflower Oil Company in open court prayed an appeal to the Supreme Court; which appeal was thereupon granted, to operate as a supersedeas of said decree upon the said Sunflower Oil Company's entering into and executing a bond, with good
148 and sufficient security, conditioned and payable, according to law, in the penal sum of fourteen thousand dollars:

Now, therefore, if the said Sunflower Oil Company shall prosecute its said appeal to effect and, if it fails to make its plea good, shall answer all damages and costs, then this obligation shall be void and of no effect; otherwise it shall remain in full force and virtue.

SUNFLOWER OIL CO.
A. M. LITTLEJOHN, *Pres't.*
GREENVILLE OIL WORKS.
HENRY CRITTENDEN,
Sec'y & Tr.

I approve the foregoing bond, with surety thereto, to operate as a supersedeas, it appearing to me that said surety corporation has not a corporate seal and binds itself by the signature of its secretary.

This January 28, 1888.

R. A. HILL, *Judge.*

Approved January 28, 1888, and filed this 30 day of January, A. D. 1888.

G. R. HILL, *Clerk.*

Appeal Bond to 2d Final Decree.

THE STATE OF MISSISSIPPI:

In the United States Court for the Western Division of the Northern District of said State.

M. H. KATZENBERGER *et als.*
v.
THE MOBILE & NORTHWESTERN RAILWAY CO. *et als.*

In the Matter of the Petition of THE SUNFLOWER OIL COMPANY
against
THE RECEIVER IN SAID CAUSE.

Appeal bond.

Know all men by these presents that we, The Sunflower Oil
149 Company, as principal, and The Greenville Oil Works, as sureties, are held and firmly bound unto Benj. Wilson, the receiver of the Mobile and Northwestern Railway Company in the above-entitled cause, in the penal sum of five thousand dollars, which payment to make we hereby bind ourselves jointly and severally.

Witness our hands this the 25 day of January, A. D. 1888.

The condition of the above obligation is such that whereas the above-bound Sunflower Oil Company was by the decree of the United States district court for the western division of the northern district of Mississippi, on the 7th day of January, A. D. 1888, adjudged and decreed to pay to the said Benj. Wilson, the receiver of the said Mobile and Northwestern Railway Company, the sum of three thousand seven hundred and twenty-nine & $\frac{82}{100}$ dollars; and it was further, at the same time, in the same said decree, ordered and decreed that the petition of the said Sunflower Oil Company against the said Benj. Wilson, receiver, as aforesaid, in the same said matter, should be, and the same was by said decree, dismissed at the partial costs of said petitioners, from the whole of which said decree the said Sunflower Oil Company prayed an appeal to the Supreme Court; which appeal was thereupon granted, to operate as a supersedeas of said decree upon the said Sunflower Oil Company entering into and executing a good and sufficient bond, conditioned and payable according to law, in the penal sum of five thousand dollars:

Now, therefore, if the said Sunflower Oil Company shall prosecute its said appeal to effect and, if it falls to make its plea good,
150 shall answer all damages and costs, then this obligation shall be void and of no effect; otherwise it shall remain in full force and virtue.

SUNFLOWER OIL CO.
A. M. LITTLEJOHN, *Pres't.*
GREENVILLE OIL WORKS.
HENRY CRITTENDEN,
Sec'y & Treas.

I approve the foregoing bond, with the security thereto, to operate as a supersedeas, it appearing to me that said surety corporation has no corporate seal and binds itself by the signature of its secretary.

This January 28, 1888.

R. A. HILL, *Judge.*

Approved January 28, 1888, and filed this 30 day of January, A D. 1888.

G. R. HILL, *Clerk.*

Certificate.

UNITED STATES OF AMERICA, }
Northern District of Miss., } ss:

I, G. R. Hill, clerk of the district court of the United States for the northern district of Miss. & western division of said district, hereby certify that the foregoing 151½ pages contain a true & perfect transcript & copy of the bill, answers, orders, petitions, cross-petition, reports, decrees, &c., severally mentioned & exemplified, and of all the proceedings pertaining to the proceedings against the Sunflower Oil Company as fully & completely as appears from the originals on file & of record in my office, at Oxford, in said district.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, on this the 4th day of August, 1888.

{ Seal United States District Court, Northern District Miss., Western Division. }

G. R. HILL, *Clerk.*

151 *Opinion of Court on Motion to Dismiss Cross-Petition.*

In the District Court of the United States for the Western Division of the Northern District of Mississippi. Dec. Term, 1887.

M. H. KATZENBERGER *vs.* MOBILE & NORTHWESTERN R. R. Co.

The questions now for decision arise upon the motion of the Sunflower Oil Mill Co. to dismiss the cross bill or petition filed by the receiver, B. Wilson, to the bill or petition filed by said Sunflower Oil Mill Co. against said Wilson as the receiver in the above-stated cause, and for the confirmation of the report of the special commissioners, *report* filed in this cause, of the balance due the said receiver for freights earned by the said railroad company prior to the appointment of said receiver.

The first question for decision is upon the motion to dismiss said petition.

The question upon which said motion is predicated is that the receiver had no authority to file said petition or to collect any debts due from the oil mill Co. for the earnings of said R. R. Co. made prior to the appointment of said receiver. By reference to the decree appointing said receiver it is found that he was directed to take into his possession the monies and assets, real and personal, belonging to said company, wherever the same might be found, and to bring,

prosecute, or defend whatever suits might be pending or
152 afterwards brought in relation to his trust as receiver, and the said railroad company was directed to deliver over to said receiver all the property, equitable interests, things in action, and all other effects which belonged to said railroad company or in which it had any beneficial interest.

This order was certainly sufficient to authorize the receiver to file his cross bill or petition to recover whatever might be due to said railroad company.

The bill filed in this cause is a general creditor's bill for the purpose of collecting all that was due said railroad company and reducing the property belonging to it into cash and distributing the same to the creditors according to tneir priorities, including, as a matter of course, the sale of the mortgaged property for the payment of the bonds and coupons secured by it. The receiver was directed to pay out of the income received by him the employees and other creditors who had claims for supplies, materials, &c., furnished or performed within six months before the appointment of the receiver. For the purpose of carrying on the business of the said railroad the income of the railroad prior to that time was first subject to the payment of these liabilities, and the right of the receiver to collect this income and whatever might be due the railroad company was necessary to this end; so that I am satisfied the motion cannot be sustained and must be overruled.

There are no exceptions taken to the correctness of the commissioner's report as to the balance due, provided the railroad company and the oil mill Co. stood in the relation of lessor & lessee and not in the -lation of vendor and vendee, and that the receiver in entitled to recover the amount of earnings for freights less the rental fixed in the contract; but it is insisted on behalf of the oil mill Co.
153 that the parties occupied the position of vendor and vendee, and that the balance found in favor of the receiver should be applied to the payment of the purchase-money.

I very carefully considered that question on the former hearing of the cause and have again examined the question and am unable to come to a definite conclusion from that then reached and fully set out in the opinion then filed. The result is that the report of the commissioner must be confirmed and a decree entered in favor of the receiver, Ben. Wilson, against the Sunflower Oil Mill Company for the sum of —— dollars, the amount so found due.

Owing to the complication that has arisen in this cause the costs will be paid equally by each party. I am glad that the Sunflower Oil Mill Company can have an appeal to the supreme court to correct any error I may have committed.

R. A. HILL, *Judge.*

Filed Jan'y 7th, 1888.

G. R. HILL, *Clerk.*

I, G. R. Hill, clerk of the district court of the United States for the northern district of Mississippi, do hereby certify that the fore-

going is a true and complete copy of the original opinion on motion as the same appears of record and on the files in said court.

Witness my hand and the seal of said court at Oxford, Miss., this the 23 day of July, 1888.

{ Seal of the United States Circuit Court, Northern District Miss., Western Division. }

G. R. HILL, *Clerk.*

154 *Opinion of Court on Merits.*

In the District Court of the United States for the Western Division of the Northern District of Mississippi. June Term, 1887.

M. H. KATZENBERGER *et als.*
vs.
MOBILE & NORTHWESTERN R. R. CO.

The questions now submitted to the court for decision arise upon the petition of the Sunflower Oil Mill Co. asking a decree in its favor for an alleged balance due from the defendant as the purchase-money for two engin-s, tenders, and other rolling stock. From the petition, answer, cross-petition, exhibits, and proofs the following facts appear:

On the first of October, 1883, the defendant R. R. company was without engin-s and other rolling stock to operate the road and without money with which to purchase it. The petitioner, the oil mill Co., was greatly in need of facilities to transport cotton seed from along the line of R. R. to the mill. To enable the R. R. Co. to operate the road on the one hand and to enable the oil mill Co. to procure cotton seed and have the same delivered at the mill on the other, the parties entered into a contract in writing, being unusual in its terms, but, when the condition and purpose of each *is* considered, *are* not very difficult to construe and understand, and upon the construction of which the questions presented for decision depend. The instrument is as follows:

(See page- 26 to 32, inclusive, of this record for a full copy of the instrument.)

155 An examination of the different provisions of this contract cannot, I am satisfied, fail to convince any one that the oil mill company took advantage of the railroad company's necessities and drove a very hard bargain. Its purpose was to monopolize the entire cotton-seed trade on the line of the railroad, and, to accomplish this purpose, to tie the hands of the railroad, requiring it to build houses, receive cotton seed, weigh and handle them, purchase them—in a word to do everything necessary to place them in the mill free of cost, except the charge for hauling, which was fixed in the contract. Indeed the stipulations are against public policy and such that courts of justice will not enforce, but it seems that the railroad company complied with its terms, hard as they are, so far as it had the ability to do so.

The most that the oil mill can claim is that this was an agreement upon the part of the oil mill to purchase the property mentioned. The title to the property became vested in and remains that of the oil mill company in the La Flour engine and the cars from the time they were purchased and paid for, and that of the Yazoo engine from the time the oil mill company paid for it. The railroad company has never had any title to this property, only a right upon the terms specified in the contract, to purchase within the specified time. Up to the time this property was placed in the hands of the receiver the railroad company was only the lessee of the property at a rental of fourteen hundred and eight dollars per annum, payable monthly. Whilst the contract provided that the railroad company might, before the time specified, purchase the property, yet it expressly provided that such purchase should only stop the rents but should not release the
156 railroad company from any other part of its obligation; that during the time specified — should purchase and forward all the cotton seed on its line, receive and handle all the oil mill freights without charge or commission; should not haul cotton seed in bulk for any one else; should do everything necessary to enable the oil mill to control all the cotton seed on its line, &c. The only compensation the railroad company was to receive was $1.75 per ton for seed in bulk and $2.00 in sacks. The contract further required the railroad company to take good care of the property and to deliver it to the oil mill company in good order, should the railroad company not be able to purchase at the end of the time specified, named at first the 1st day of January, 1886, afterwards extended to the 1st day of January, 1887. As the record shows, before this last time arrived the railroad company had become hopelessly insolvent and the property had been placed in the hands of the receiver, so that the contingency mentioned in the contract, which excused the railroad company from purchasing the property, had arisen and it was released from compliance with this part of the contract.

The provisions in the contract that the freights earned by the railroad company for transporting the seed and other property for the oil mill company should be credited upon the rents was right and proper. It was also within the power of the parties to provide that any surplus which might remain from time to time on the monthly settlements should remain in the hands of the oil mill, at 8 per cent. per annum interest, to be applied to the payment of the purchase-money for the property should the railroad company be able to purchase at the time stipulated, which has not and could not have been made. The oil company took the risk of the
157 railroad company being able to purchase the property at the time fixed in the contract and, as we have seen by the contract, secured to itself ample indemnity & compensation for the risk it run.

I am satisfied that, giving to each party the rights fixed in the contract, they can only be considered as in the light of lessor and lessee at the stipulated rental from the purchase of the property up

to the first day of January, 1887. It is true that a short time before that time the property was placed in the hands of the receiver, and by the order of the court and the consent of the oil mill company the property remained on the road and in the possession of the receiver, upon the same terms of rental as before, until the further order of the court.

So far as it relates to a settlement of the rights of the oil company and the railroad company *is concerned*, it will be most convenient & fair to close the accounts between them on the first day of January, 1887, and the accounts between the oil mill company and the receiver since that time. The result is that a reference must be had to a master to take and state an account between the oil mill company and the railroad company, showing the amount due from the oil mill company to the railroad company for freights at the end of each month, as specified in the contract, to be credited with the sum of $117.33\frac{1}{3}$, the monthly rent as fixed by the contract, or if the rent for the month exceeds the amount due, then the rent will be credited with the sum due for freights earned during the month, with interest at 8 per cent. per annum upon the balance either way up to first day of January, 1887. This being the rate of interest fixed on our side, it is reasonable to allow the same rate
158 of interest on the other and to continue the account in this way up to the first day of January, 1887, and then strike a balance and ascertain the amount due on the one side or the other. If the petitioner desires it, a reference will also be made to the master to take proof and ascertain whether or not the property was used with reasonable care while in the use and control of the railroad company and, if not, how much it was damaged for the want of such care, and report the same. In doing so he will not take into the account the difference in value from the time it was received by the railroad company up to the first day of Jan., 1887, but only whether they were in good order and condition and, if not, what sum would be required to put them in good order and condition, not including the ordinary wear and tear incident to their use.

As the court directed the receiver to continue the contract in existence with the owner of the rolling stock until other agreements and contracts could be made, and that the oil mill should not be required to pay for freights carried by the R. R. Co. whilst in the hands of the receiver until the matters in dispute should be heard and determined, which, it was then expected, would soon be done, the accounts between the receiver and the oil mill company will be referred to a master to take proof and ascertain the amount of the earnings of the railroad company so due from the oil mill Co. and will credit the same with the rental of said rolling stock at $117.33\frac{1}{3}$ per month up to the time an agreement was made between the receiver and the oil mill company for a lower rental, and after that time at the rate so agreed upon up to the taking of the *taking of the* account.

159 The conclusion reached—that there was no sale, and that the parties under the contract stood toward each other in the relation of lessor and lessee—take- the case out of the rule insisted

upon by petitioners' counsel—that the railroad company is not entitled to recover from the oil mill company the surplus of the earnings due after the payment of the rents. There is nothing in the contract stipulating that, upon a failure to purchase, this surplus is to be forfeited, as was the case in the case of Hansborough *vs.* Pick, 5 Wallace, 497. In that case it was a contract of purchase, and it was stipulated in the contract that if the payments were not promptly made the purchaser should forfeit all payments made, and that the preceding provisions of the contract should be null and void and no longer binding at the option of the vendor, so that the forfeiture of the money paid was a part of the contract. Not so in this case; nor does this case fall under the general rule that where, in part performance of an agreement, a party has advanced money or done an act and then stops short and refuses to proceed to its conclusion, the other party being willing to proceed to fulfill all his stipulations according to the contract, such first-named party will not be permitted to recover back what has been advanced or done, for in this case there is a provision which excuses the railroad company for not making the purchase, even if otherwise liable for not doing so, and that was the inability to pay for the property at the time the purchase was agreed to be made.

There is no injustice in requiring the oil mill company to pay any surplus that may be found against it to the railroad company, or rather to its creditors, with the interest stipulated in the
160 contract, less any damages the petitioner may have sustained by want of proper care of the property whilst so used, or any sum necessary to put the property in good condition if not so on the first day of January, 1887. The oil mill company has received possession of its property, received the rents stipulated in the contract, and besides has received the benefit of a monopoly of the cotton seed on the line of the railroad; besides has had the services of the employees of the R. R. Co. in purchasing, weighing, and forwarding the cotton seed and other freight without charge or compensation. In other words, so far as it has related to its business and interest, has control-ed the R. R. Co., or at least under the contract had the power to do so.

R. A. HILL, *Judge.*

Filed Aug. 12, 1887.

G. R. HILL, *Clerk.*

I, G. R. Hill, clerk of the district court of the United States for the northern district of Mississippi, do hereby certify that the foregoing 7 p'g's contain a true and complete copy of the original opinion of court on merits as the same appears of record and on the files in said court.

Witness my hand and the seal of said court, at Oxford, Miss., this the 24 day of July, 1888.

{Seal United States District Court, Northern District, Miss., Western Division.}

G. R. HILL, *Clerk.*

Endorsed on cover: N. Mississippi D. C. U. S. No. 1138. The Sunflower Oil Company, appellant (in pencil: from decree of Jan. 7, 1888), *vs.* Benjamin Wilson, receiver of the Mobile and Northwestern Railway Company. No. 1139. The Sunflower Oil Company, appellant, *vs.* Benjamin Wilson, receiver of the Mobile and Northwestern Railway Company. Filed September 27, 1888.

IN THE

Supreme Court of United States

SUNFLOWER OIL COMPANY *vs.* BEN WILSON, *Receiver.*
No. 1138.

Motion, and Brief of Appellee on Motion to Dismiss, Etc.

MOTION.

In this cause appellee moves the court to dismiss the appeal and affirm the judgment or decree of the District Court on the following grounds:

1. Because of want of surety on the appeal bond, the Greenville Oil Works not having power to become surety for another, and no authority to its Secretary and Treasurer, Henry Crittenden, to so bind it being shown.

2. Because, as appears from the record, said sum of $10,550.41, adjudged by the District Court as due from and to be paid by appellant, was for freight moneys earned by the Mobile & Northwestern R. R. Co. in the transportation of cotton seed and other freights for appellant over and above the rental of the engines and cars leased by appellant to said R. R. Co., and was a surplus belonging to said R. R. Co. as stipulated in the contract between those parties.

And appellant having entirely failed to show that said R. R. Co. had exercised its option to purchase said engines and cars, which alone would entitle appellant to retain said surplus as payments on purchase money account, is on its own showing bound to repay said moneys to appellee, receiver, etc. So it is manifest that the appeal was taken for delay, and the judgment below should be affirmed.

STATEMENT.

In 1877 the Mobile & Northwestern Railroad Company constructed some twenty-five miles or more of railroad in Coahoma County, Mississippi, one terminus being on the Mississippi River opposite Helena, Arkansas, and in that year it mortgaged its railroad, properties, appurtenances and franchises to secure some $250,000 of bonds. Thereafter in 1883 it contracted with appellant that the latter should buy certain engines and cars and lease them to the R. R. Co. at a stipulated monthly rental; that the R. R. Co. should carry cotton seed and other freights for appellant and render it certain other services; and if *able* would purchase said engines and cars from appellant on or before the end of the term of the lease (1st January, 1886,) at cost, and it was also agreed that appellant should retain all moneys due from month to month for freights carried for it by the R. R. Co., crediting same first on the rental of these engines and cars and holding any surplus for account of such purchase, if, and when made. This contract never was proven nor recorded until September, 1886.

The Railroad Company was utterly insolvent, never paid any interest on its bonded debt, and in November, 1886, M. H. Katzenberger and others, holders of these bonds, filed their bill in the District Court of Mississippi, at Oxford, asking a foreclosure of the mortgage made for their security and for a receiver pending the sale, etc. The District Judge, Hon. R. A. Hill, granted the motion for a receiver, and appointed Ben Wilson, appellee, to that office in November, 1886, who, directly, duly qualified and took charge of said railroad and began operating same under the orders of that court. On the 14th day of February, 1887, the

appellant, who was not a party to Katzenberger's bill, interposed by petition, setting up its contract, above mentioned, with said Railroad Company, alleging that a balance of $6,732.15, was due it on the purchase of said engines and cars, and praying that the receiver be required to carry out the provisions of said contract, by continuing to carry freights for appellant, allowing it to retain all moneys due the receiver for such services as credits on said rental and purchase money accounts.

On this petition, the District Judge, who had previous to its filing made provisional orders on appellant's motion, directing the receiver to suspend collection of moneys due on freights carried for appellant, renewed such suspensory orders and directed an issue to be made on the allegations of the petition.

Thereafter the receiver answered, denying that the Railroad Company had ever purchased said engines or cars of appellant, or that the R. R. Co. was indebted to appellant in any sum on these matters, but rather that appellant had retained a large sum of money in excess of the agreed rental and so was indebted to him $10,258.86, in excess of rentals paid, etc., and for the recovery of this over-payment the receiver filed his answer in the nature of a cross-bill or petition, etc.

Upon the issue thus made, proof was taken on behalf of appellant, which tended to show that said Railroad Company had never exercised its option to buy said engines and cars,—that appellant and said R. R. Co. had expressly agreed to extend the terms of the lease and option to buy from 1st January, 1886, to 1st January, 1887, during which term the bill for foreclosure was filed by Katzenberger,

and the receiver put in charge of the road. The case was submitted on appellant's proofs alone, none being taken by appellee.

At the hearing the District Judge was of opinion that the R. R. Co. had never exercised its option to buy said engines and cars from appellant,—that appellant was not entitled under its contract with the R. R. Co. to have the receiver carry freights for it, except on payment of freight charges,—that as the R. R. Co. had never been able to purchase and had never exercised its option to purchase, the appellant was liable to the receiver for the use of the creditors of the R. R. Co. for all surplus of freight moneys earned by the R. R. Co. above the stipulated rental, and references were made to ascertain the amounts due to the R. R. Co. prior to the receivership and the amounts due under the receivership. On the coming in of the reports on these references, which were not excepted to, judgments were rendered against appellant, one for $3,729.82 for freight moneys earned by the receiver, the other for $10,-550.41, for surplus of freight moneys earned by the R. R. Co. prior to the receivership above the rental of the engines, etc.

This latter judgment for $10,550.41 is brought here for review by this appeal.

BRIEF AND ARGUMENT.

First.

The surety on the appeal bond made by appellant in this matter is the "Greenville Oil Works," a corporation organized under the general laws of the State of Mississippi,[1] which confer no authority upon it to loan money or credit, but rather prohibit such acts, much less power to become surety for others.

Argument or authority to show that power to become surety for others is not one of the usual franchises of corporations, and must be expressly conferred in order to warrant its exercise, would seem unnecessary, and it cannot be pretended that becoming such surety is in any sense within the corporate purpose or undertaking of that company.[2]

Second.

The Sunflower Oil Company and the Mobile & Northwestern Railroad Company were citizens of Mississippi; the contract was made in Mississippi; and it was to be performed in Mississippi. It was therefore a Mississippi contract, and its construction and effect are to be determined by the law of that State.[3]

In Mississippi the doctrine of Conditional Sales is fully recognized. The retention by the vendor as a security; the distinction between such a contract and a mortgage;

1 Mississippi Revised Code, 1880, Secs. 1027, 1031, 1032–1043–1044. Appendix, page 21.

2 Morawetz Private Corp., Secs. 392–4–423.
Angell & Ames' Corp., Sec. 258.

3 Hervey v. Rhode Island Locomotive Works, 93 U. S. 664.
Harkness v. Russell, 118 U. S. 663.

the exemption (arising out of that distinction) from any obligation to place the instrument of sale on record, even as against a bona fide purchaser;—all have been adjudicated and settled. It is a question not open to further discussion; a rule of property.[4]

Nor is there any discord between the Supreme Court of Mississippi and this court on these propositions. The two courts are in perfect accord.[5]

The foregoing principles are not the controlling ones in this case. They are set forth briefly, for the sole purpose of freeing the case from any query which might occur to the court, as to whether there might not be some complication of statutory origin or of peculiar State ruling. The instrument before the court, and which dominates the case, is now shown to be open for interpretation on its own merits wholly, unaffected by any local vagaries of either legislation or decision.

That contract is in the following terms:

"This contract, made and entered into on the 6th day of October, 1883, by and between the Sunflower Oil Company, of Clarksdale, in the State of Mississippi, and the Mobile & Northwestern Railroad Company, both corporations under and by virtue of the laws of the State of Mississippi, *witnesseth:*

"That the said Sunflower Oil Company has this day agreed to purchase of the Baldwin Locomotive Works, in Philadelphia, Pa., two locomotive engines and tenders

4 Ketchum & Cummings v. Brennan, 53 Miss. 596.
Duke v. Shackleford, 56 Miss. 552.

5 Harkness v. Russell, 118 U. S. 663.
Heidekoper v. Hinckley Locomotive Works, 99 U. S. 258.

complete, named, respectively, Le Flore and Yazoo, at the price of seventy-six hundred dollars each, making together the sum of fifteen thousand two hundred dollars, and to invest the further sum of two thousand four hundred dollars in box and flat railroad cars. All of which property the said Oil Company agrees to lease unto the said railroad for the full period of time up to January 1st, 1886, at and for the sum of fourteen hundred and eight dollars per annum. Said rental to be due and payable on the last day of each and every month, while this contract continues, in monthly installments.

"Said locomotive engines and cars are to be bought and paid for in the following manner, to-wit: The engine Le Flore and said cars are to be paid for by said Oil Company in cash, and are at once to be and continue its property until purchased by said Railroad Company in the manner hereinafter provided. And said locomotive engine Yazoo is to be purchased of said Baldwin Locomotive Works, upon the obligation of said Railroad Company, guaranteed by the mercantile firm of J. T. Fargason & Co., of Memphis, Tenn., which guaranty the said Oil Company has agreed to procure for said purpose. Which obligation is to be paid to said Baldwin Locomotive Works six months from this date, together with six per cent. interest; and until the payment of said obligations the title to said locomotive Yazoo is to be and remain in said Baldwin Locomotive Works. Should said Railroad Company pay said obligation at maturity, the title to said engine is to be in it; but should the said J. T. Fargason & Co. have to take up said obligation on account of their said guaranty, then the title to said locomotive Yazoo shall be and remain in said Sunflower Oil Company until said Railroad Company

shall acquire title to it, and the other said property, in the manner hereinafter set forth.

"Should said Railroad Company promptly meet said obligation to said Baldwin Locomotive Works for said engine Yazoo, then thereafter the rental of the property above named belonging to said Oil Company shall be eight hundred dollars per annum, payable in monthly installments, at the end of each calendar month, while this contract has to run.

"The said Railroad Company further agrees and binds itself to take all proper care of said locomotive engines, tenders and cars, *and turn the same over to said Oil Company in good order and condition at the end of this contract*, SHOULD SAID RAILROAD COMPANY BE THEN UNABLE TO PURCHASE THE SAME AT THE PRICE HEREINAFTER MENTIONED. And said Railroad Company further agrees to use and operate said property upon the line of its railroad, and to turn the same over, should it at any time violate its agreements, upon the demand of said Oil Company.

"The said Railroad Company further agrees that it will, on or before said 1st day of January, 1886, purchase all of said property from said Oil Company, and pay for it in cash the cost price thereof. But said Railroad Company shall have the right at any time before said 1st of January, 1886, to purchase the whole of said property by paying the cost price thereof to said Oil Company; and in the event it does so, the contract of rental hereinbefore set out shall immediately cease and determine; but such purchase shall not have the effect of anywise impairing this contract so far as its other terms are concerned.

"And said Railroad Company further agrees that it will, within sixty days from this date, erect houses at four, or

more, if necessary, of the depots on its said road, for the purpose of receiving cotton seed in bulk for said Oil Company, and that it will have scales for weighing seed by the wagon load; and that it will haul seed in bulk from the various points along the line of said railroad to Clarksdale, Miss., for said Oil Company. It is further agreed that the agents of said Railroad Company along the line of its road will weigh cotton seed, purchase same, if desired, all free of cost for any service to said Oil Company. The said Railroad Company agrees that it will haul all sacks for said Oil Company free of charge; and that it will receive and handle all freight for said Oil Company at the Mississippi River, opposite Helena, Ark., free of storage or commission. It is understood that the freight to be paid by the said Oil Company to the said Railroad Company for hauling cotton seed in bulk or in sacks, or for any product of the mill, or for supplies for said mill, shall be at reasonable rates, to be fixed at various times by the Presidents of said two companies; but the freight on seed in bulk is not to exceed $1.75 per ton, and freight on seed in sacks is not to exceed $2.00 per ton.

"It is further agreed *that said Railroad Company will not haul cotton seed in bulk for any other corporation or person*, nor permit its agents to purchase or pay for cotton seed for any other corporation or person. The said Railroad Company further agrees to put in a switch or side-track at Clarksdale, so as to reach the mill of said Oil Company, so as to load and unload freight at said mill.

"It is further agreed, that said Railroad Company will give all needed facilities *and preference* to the said Oil Company *to enable it to control all cotton seed along the line of said railroad as it now is, or as it may be, while this contract is in force.*

"All freight earned by said Railroad Company for hauling seed, supplies or products of any kind for said Oil Company is to be credited on account of the rental of said property, and, should there remain a surplus after paying rent, it is to remain in the hands of said Oil Company and go as a credit upon the purchase money of said property. Interest is to be allowed said Railroad Company on such surplus at the rate of eight per cent. per annum.

"Said Railroad Company is to furnish said Oil Company a statement of freight due it at the end of each month while this contract continues and the same is to be credited in the manner above stated.

"This contract is to continue in force until the 1st day of January, 1886.

"Witness the signatures of said companies by their respective presidents this day and year first above written.

"THOS. T. A. LYON,
"*Prest. Mobile & Northwestern Rwy Co.*
"JOHN T. FARGASON,
"*Prest. Sunflower Oil Co.*

"We the undersigned, President and Secretary pro tem. of the Mobile & Northwestern Railroad Company, certify that on the 8th day of October, 1883, at a meeting of the Directors of said Company held at their office in Memphis, Tenn., the following resolution was passed:

"Resolved that the contract made between Thos. T. A. Lyon, President of the Mobile & Northwestern Railroad Company, and Jno. T. Fargason, President of the Sunflower Oil Company, at Clarksdale, Miss., under date of October 6, 1883, regarding the purchase of locomotives and cars, and hauling seed, &c., is approved and ratified.

"THOS. T. A. LYON,
"*President.*
"JOHN R. FLIPPIN,
"*Secretary pro tem.*"

"It is hereby agreed between the Sunflower Oil Company and the Mobile & Northwestern Railroad Company, that the time for the *purchase* by said Mobile & Northwestern Railroad Company of the engines and cars of said Sunflower Oil Company, mentioned in the foregoing contract, be extended for one year from the first day of January, 1886, and that the said contract and all the provisions thereof, *with the change made in the time for the purchase of said engines and cars*, as aforesaid, be extended and continue in force until the 1st day of January, 1887.

"MOBILE & NORTHWESTERN R. R. CO.,
"By THOS. T. A. LYON, *President.*
"THE SUNFLOWER OIL CO.,
"By J. T. FARGASON, *President.*"

Such is the contract presented in this cause for the court's construction. His Honor below well said of it, both that it was "very unusual in its terms" and that it was "not very difficult to construe and understand."

It will probably be of service to determine what the contract is *not*, by way of preliminary to the consideration of what it *is*.

First.—The contract is not a mortgage. In the case of *Herryford v. Davis, 102 U. S., 235*, this court construed a contract executed under conditions somewhat similar to those of this cause; and held the contract to be, not a conditional sale, nor yet a lease, but a mortgage. But the contract in that case was radically different from this contract. Amongst other differentia may be observed these: (1) in that case, the court points out and emphasises the fact that, not only was no payment of hire provided for or

required, but all intention to demand it was negatived by the strongest implications; while here, not only is hire expressly stipulated and exactly fixed, but also the payment of it, month by month, secured by the most stringent provisions; (2) in that case, as again the court points out and emphasises, the alleged seller took the notes of the alleged purchaser for all of the price of the cars, and exacted collaterals for security; while here the relation of debtor and creditor never existed between the Railroad Company and the Oil Company; nor, indeed, could exist consistently with the terms of the contract, which expressly twice provides that the purchase, when made, should be "*in cash*"; (3) in that case, also the court points out that the cars when taken back by the alleged vendor, on non-payment, were to be taken back, not as owner, but as a trustee for sale; while in the case at bar, in case of surrender of the cars because of inability to purchase, the surrender was to be absolute, and the Oil Company took as owner.

However, it is not necessary to dwell upon this point. The Oil Company does not claim that the transaction was a mortgage. It itself characterizes it as a "contract of rental and purchase." So that as to the question of mortgage or no, both sides are agreed; and we have shown briefly, that such accord will stand the test of judicial scrutiny.

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a It is true that as to one engine the Railroad Company was to execute a note to the Baldwin Works, to be guaranteed by Fargason & Co. But neither of those concerns were parties to this contract. The Oil Company, the contracting party, was not, in any way, a party to the note. If Fargason & Co. should be compelled to pay the note, the contract expressly provided, not that the engine should be sold for reimbursement, but that the title should vest in the Oil Company; the manifest implication being that such company should be the purchaser and assuming the exoneration of Fargason & Company.

Secondly—The contract is not an absolute sale. It is not necessary to dwell upon this proposition. Its correctness is manifest, on even the most cursory reading of the document. It is about as replete with conditions as is possible. Over and over again, the title to the property is expressly declared to be withheld from the railroad until it shall be purchased ("for cash," twice); and the supplementary agreement executed 1st January, 1886, extends "the time for the purchase" one year from that date.

This court has gone over all this ground in *Harkness v. Russell, 118 U. S., 663*; and in their opinion is quoted approvingly this sentence from *Barrett v. Pritchard, 2 Pick., 512*; "IT IS IMPOSSIBLE TO RAISE A DOUBT AS TO THE INTENTION OF THE PARTIES, FOR IT IS EXPRESSLY STIPULATED that the wool before manufactured, after being manufactured, or in any stage of manufacturing, shall be the property of the plaintiff until the price be paid," etc.

It being therefore easily certain that this contract is neither a mortgage nor yet an absolute sale, it remains to say what it *is*. The query is readily answered. The controlling provisions of the agreement on this head are these:

1. The Oil Company agrees to buy from the Baldwin Works certain rolling-stock, to be paid for by the Oil Company in cash, except as to one engine; and all the rolling-stock to be the property of the Oil Company, except that one engine.

2. The excepted engine is to be purchased with a note of the Railroad Company, guaranteed by a third party, whose guarantee the Oil Company is to obtain. This note, the

Railroad Company may pay "promptly," "at its maturity," and thereby acquire title to that engine, the title meanwhile remaining in the Baldwin Works. But if the Railroad Company fail to pay "promptly," "at its maturity," and the guarantor pay it, then the title is to vest, not in the guarantor, but in the Oil Company.

3. During all this time the Railroad Company owes to the Oil Company no debt for the rolling stock; but on the contrary pays monthly rent for it; *actual* rent, (not colorable and amounting to payment of principal, as in Harvey v. Locomotive Works, 93 U. S).

4. The Railroad Company binds itself, moreover, to purchase, "for cash," on the 1st day of January, 1886, all of the rolling stock, at original cost price, with an option, however, to buy it before the 1st of January, 1886. It is not correct to say that the Railroad Company had an option to purchase on that date, which option it must have affirmatively exercised. That expression imports more liberty than the Railroad Company enjoyed. It was bound to purchase on that day, with one (and only one) condition, that of ABILITY TO PAY IN CASH ON THAT DAY.

5. If on the 1st January, 1886, (or 1st January, 1887, as extended by the supplemental agreement), the Railroad Company was unable to pay in cash, not for a part, but for the whole, of the rolling stock, the full cost price of $17,600, then also *it was bound* (not any option) *to return the whole property*, absolutely, unconditionally, and without any reserved rights.

6. Pending the lapse of the time during which the contract was to run; pending the solution of the problem of ability to pay $17,600 in cash on the ultimate day fixed,

and as a safeguard against the unrestrained dissipation of the railroad's earnings in other quarters, a sort of savings bank was extemporised. All the freights earned from the Oil Company were to be held back and credited to the Railroad Company: first, to the extinguishment of the rents, and secondly, as a reserved fund *belonging to the Railroad Company*, and on which it was to receive that allowance, impossible except on a debt due, interest. It is idle to speak of this surplus going as a credit on the purchase money at any time anterior to the 1st of January, 1887; there was no purchase money owing; the whole question of sale or no sale was to turn on the inexorable conditions of ability to pay in cash, or want of ability to pay in cash, for the whole of the rolling stock, $17,600, on the 1st of January, 1886, (1887 as extended); meanwhile the surplus was drawing interest, and was in effect a special deposit, non-removable except in one contingency—that of inability to buy as aforesaid. Nor could such surplus be treated as a payment for any part of the rolling stock. Except in the one instance, strictly limited to the payment of the note to the Baldwin Works "promptly," "at its maturity," there was no contingency under which the Railroad Company could buy any portion of the rolling stock. Always, after the title to the Yazoo vested in the Oil Company, it was *the whole* that must be purchased; the whole, or none; so runs the bond.

The contract, therefore, was this: A composite instrument, including a contract to sell and to buy on a day certain, *conditioned* on the ability of the proposed purchaser to pay in full in cash on that day, and with an option to the purchaser to buy, for cash in full, at any time before

that day; in the meanwhile, a lease for a fixed monthly money rent.

In fact, the fates decided against the sale. The one contingency upon which the purchaser was to be free from its contract to buy, fell in; that is to say, the inability to pay in full in cash. On the extended day, the 1st of January, 1887, the Railroad Company was broken, and its assets in the hands of a receiver, under foreclosure proceedings.

In this suit, the Oil Company occupies the remarkable attitude, that in the very contingency which it foresaw, and for which in its contract (and a thorough blood-warrant it is) it provided its own remedy, it resists the exact and literal performance of its own peremptory provision.

Let the court clearly remember that the express provision of the controlling paragraph is: "The said Railroad Company further agrees and binds itself to take all proper care of said locomotive engines, tenders and cars, *and turn the same over to said Oil Company in good order and condition at the end of this contract, should said Railroad Company be then unable to* PURCHASE *the same at the price hereinafter mentioned.*" "*To purchase* the same;" not "*to pay*" for the same as now purchased and agreed on.

That is the key to the whole contract.

Thus far the argument has proceeded on the construction of those features of the contract which directly bear on the obligation to purchase. If the propositions advanced should gain the assent of the court, they alone will determine the case in favor of the appellee. But in the event that the court do not assent to them, then there is still another, and entirely a distinct, line of discussion, to which the court's attention is now invited.

The contract in question was unlawful, and therefore void, *ab initio;* and for these reasons:

The Railroad Company agreed that it "*will not haul cotton seed in bulk for any other corporation or person;*" not at any price, the court will observe.

It also agreed to "*give all needed facilities and preference to the said Oil Company to enable it to control all cotton seed along the line of said railroad as it now is, or as it may be, while this contract is in force;*" i. e., from the 6th of October, 1883, to the 1st of January, 1886.

Here, then, is a contract in which a railroad company, enjoying its franchise in consideration of public service, expressly agrees not to haul one of the most important commodities of its locality in bulk for any person other than the Oil Company, on any terms; and also enters into a formal and avowed conspiracy for the creation of a monopoly in that commodity. A plainer and more flagrant violation of its duty to the public would be hard to imagine; and its charter could have been revoked because of it.[6]

Nor can it be said that these unlawful stipulations are separable from the remainder of the contract; and therefore that while, as to them, the contract was void, yet as to its other features it was good.

The contract embodied a single and connected scheme; its various positions were inter-dependent, as is shown by the analysis previously made. Further, and to enforce this point, mark this clause: "And said Railroad Company

6 Cotten v. McKenzie, 57 Miss. 418.
Scofield v. R. R. Co., 43 Ohio St. 571.
Handy et al. v. R. R. Co., 31 Fed. Rep. 689.

further agrees to use and operate said property upon the line of its railroad, *and to turn the same over, should it at any time violate its agreements*, upon the demand of said Oil Company." If a single car load of bulk seed were hauled for any one other than the Oil Company, for any purpose, at any price; if in any particular the Railroad Company should fail so to "prefer" the Oil Company over any and all persons whomsoever, so far as might be needed to create a monopoly in seed for the Oil Company, then could all the rolling stock be demanded, and the running of the road practically stopped.[7]

It seems to be unnecessary to enlarge on the flagitious character of this contract. "It stinketh to heaven."

Being void, how, then, do the rights of the parties stand?

1. The attempt of the Oil Company to maintain a proceeding in the nature of a bill for a specific performance of the contract as it claims the contract to be, will, of course, fail. There was no lawful contract of any sort.

2. The freights earned by the Railroad Company cannot, of course, be retained by the Oil Company. Why should it not pay over the freights to the receiver? It will say, for two reasons: first, because part of it must go to pay the hire for the rolling stock; and secondly, because the balance must go to pay the purchase money of the same.

We answer, first, as to the rents. It is manifest--the contract produced being unlawful and void—that the rents therein stipulated cannot be asserted. If the Oil Company is entitled to any allowance whatever for rents, it must be on a *quantum valebat*, from an obligation implied by law out of

7 Bank v. Stegall, 41 Miss. 142.

the use of the rolling stock by the Railroad Company. Even that, under the circumstances, is more than doubtful. But all this is of no moment. The rents were allowed to the utmost of the Oil Company's demand; and the appeal is not from that allowance. The balance left over, after that allowance, is the fund in controversy here. Nothing else.

We answer, secondly, as to the purchase money claim. The contract is unlawful and void, *in toto*. The evidence wholly fails to disclose any contract of purchase, conditional or absolute, other than the one embodied in the void agreement of October, 1883. It is not even claimed that there was any other.

Nor can it be said that the contract by which the money came into the hands of the Oil Company being illegal and void, and the decree rendered against it being on a cross-petition, that such decree was erroneous as disregarding the maxim: *in pari delicto potior conditio est defendentis.*

Even were the litigation between the two companies, the parties to that unlawful contract, and were the two companies in *equal* fault, i. e., in *pari delicto*, the position would be untenable.

1. Because the demand for freights earned need not be made out through the illegal contract.[8]

2. Because, even if the freights had been earned through the illegal contract, yet the illegal transaction is *over and complete*, and the party in possession will not then be allowed to set up the defense.[9]

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8 Wooten v. Miller, 7 S. & M. 380.
Gilliam v. Brown, 43 Miss. 641.
Holt v. Barton, 42 Miss. 711.

9 Gilliam v. Brown, 43 Miss. 641.

Again, even were the litigation between the two contracting companies, that maxim would not apply; and for the reason that the case is not disclosed of parties *in pari delicto;* they were both *in delicto*, but not *in pari delicto.* The distress of the Railroad Company, and its dependence on the Oil Company, is plain, and a more extortionate trade was never driven.[10]

And, finally, the litigation is not between the two companies, but is between the Oil Company and the receiver, the latter being the officer of the court appointed for the benefit of the creditors of the insolvent Railroad Company.

For these reasons we submit that it is apparent that this appeal is merely for delay. The case was heard below upon appellant's proofs alone; none were taken or offered by appellee; and, upon its own showing, appellant is indebted as adjudged below, and that judgment should be affirmed.

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10 O'Conner v. Ward, 60 Miss. 1025.

Holmes Cummins

Counsel for Appellee

APPENDIX.

REVISED CODE OF MISSISSIPPI, A. D. 1880, CHAP. 38.

AN ACT in Relation to Corporations and Other Associations.

Section 1027. Corporations may be created under this act for the following purposes, to-wit: For Masonic and Odd Fellows' lodges; temperance societies and associations; charitable associations; literary institutions or associations; religious societies; fire companies; mechanics' societies or associations; agricultural societies; associations for building hotels and theaters; co-operative associations for purposes of trade; manufacturing companies; and shall be as valid in all respects as if such corporations had been severally created by the legislative enactment.

Sections 1028–1029 and 1030 provide for the registration of the articles of incorporation in the Secretary of State's office, and publication thereof in some newspaper at the domicil of the corporation.

Section 1031. Every corporation created under this act, and all others not otherwise provided for, shall have succession for the time limited in the charter, and if no time be limited, then perpetual succession; they may determine the manner of calling and conducting meetings; the number of members that shall entitle a member of a joint stock company to a vote, and the mode of voting by proxy; they may elect all necessary officers, and prescribe the salaries and tenure of officers; they may sue and be sued, and pros-

ecute and be prosecuted, to judgment and satisfaction, before any court of justice in the State; they may each have a corporate seal; they may contract, and be contracted with within the limits of their corporate powers; they may sell and convey their real estate, under their corporate seal, and the signature of the President or presiding officer, and may also sell their personal estate; they may make all necessary by-laws, not inconsistent with the laws of this State, and impose all necessary duties. The first meeting of any duly incorporated body, unless otherwise provided for, may be called by a notice published in some convenient newspaper, for at least ten days before the time appointed for the meeting, which notice shall be signed by one or more persons named in the charter, and such meeting, when assembled, may proceed to organize the corporation.

Section 1032. Every corporation, not otherwise provided for by act of the legislature, may hold real and personal estate, necessary and proper for its purposes, not exceeding fifty thousand dollars, manufacturing companies excepted, which may purchase and hold property to the amount of five hundred thousand dollars, including its stock, and excepting also insurance companies, which shall not be chartered with a less capital than one hundred and fifty thousand dollars. And no corporation shall have a trust, use, or benefit, in property held in the name of any other person for its use, either expressly or secretly, to a greater amount than it may lawfully hold, *nor shall any corporation employ its capital, money or other thing, in any other way than in pursuit of its legitimate business; and any corporation offending against any of these provisions shall forfeit its charter*, and shall also forfeit all property, real and personal, above the amount it may lawfully hold, to

the State. *Provided*, that nothing herein contained, shall prevent any corporation from taking a lien on property, real and personal, to a greater amount than it may hold, as a security for a debt, or from taking property to a greater amount than it may hold, for the payment of a debt; provided, the same shall not be held for a longer period than two years.

Section 1043. No note, obligation, or security of any kind, given or transferred by any subscriber for stock, in any manufacturing company, shall be considered, taken or held, as payment of any part of the capital stock of the company; a*nd no loan of money shall be made by the company, to any stockholder therein;* and in case such a loan should be made, the officers who make it, or assented thereto, shall be jointly and severally liable for the amount thereof, and interest, to creditors whose debts were contracted before the repayment of the money by the borrower.

Section 1044. *No part of the capital stock, in any manufacturing company, shall be withdrawn or diverted from its purpose;* and no dividend of profits shall be declared, when the company is insolvent, or would be rendered insolvent by the payment of such dividend; and the directors who declared and paid such dividend, as well as the stockholders who received it, shall be jointly and severally liable to creditors, whose debts then existed, to the extent of such dividend and interest, in case the corporation should be insolvent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1888.

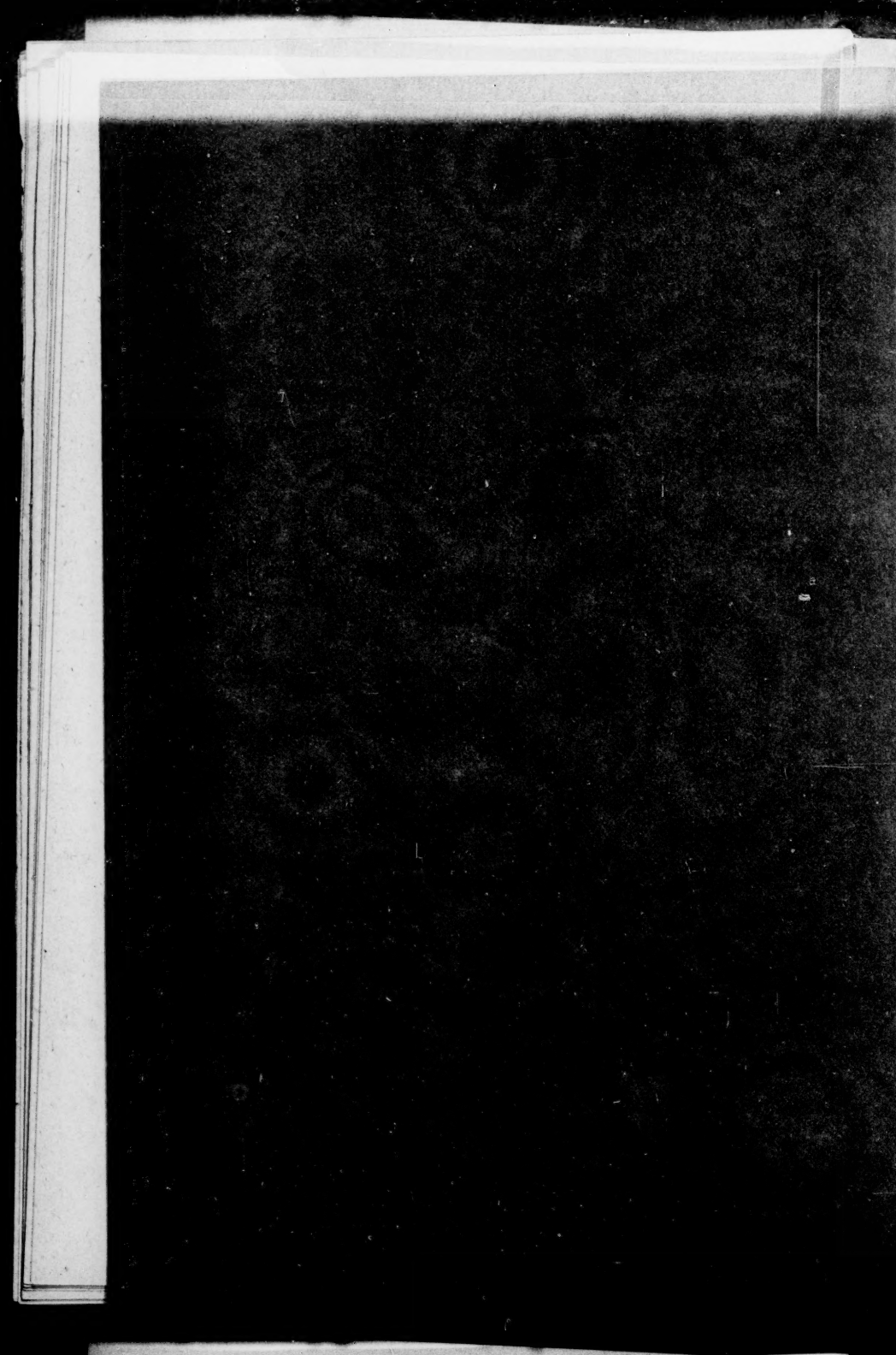
SUNFLOWER OIL COMPANY

versus No. 1138

BENJAMIN WILSON, *Receiver Mobile & Northwestern Railway Co.*

BRIEF FOR APPELLANTS ON MOTION TO DISMISS AND AFFIRM.

THOS. C. CATCHINGS,
JNO. W. & WM. D. CUTRER,
Of Counsel for Appellant.



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BENJAMIN WILSON, *Receiver Mobile & Northwestern Railway Co.*

Statement, Brief and Argument on Behalf of Appellant, on the Motions of Appellee to Dismiss and Affirm.

STATEMENT.

The Mobile & Northwestern Railway Company, in 1877, executed a trust deed, termed in the pleadings, a mortgage, on all its property, to secure an aggregate bonded indebtedness of $250,000. It failed from the beginning, in the payment of interest, and at the time the original bill in this cause was filed, had been in default for from four and a half to eight and a half years. Record p. 5. Notwithstanding such prolonged and continuous default, the bondholders suffered the entire property to remain in the hands, and under the uninterrupted control and management of the Company, its officers and agents. During the continuance of this state of affairs, in January, 1883, the President of the Railway Company, Thos. T. A. Lyon, contracted with the Baldwin Locomotive Works for two locomotives, at a cost of $7600 each, to be completed in the fall of that year. Just preceding their completion the only locomotive the Railway Company then had became permanently disabled; and though the new locomotives or-

dered were then within a few days of completion, the Company had no money, nor means of securing money, to pay for them. In this strait, and when the bondholders themselves would extend no assistance, on application to the appellant, that Company intervened and advanced the means necessary to avert a total suspension of the Railway Company's business, and a total wreck of the interests of the bondholders. It advanced the means requisite to the purchase of the locomotives and other needed rolling stock that the Railway Company had already contracted to purchase, and, as security for the advances so made, took the title to the property to itself, while the Railway Company, on its part, undertook to repay such advances, with eight per cent. interest, by freight hauled for the Oil Company, to be by it retained and applied to and for that purpose. When such repayment should thus be effected, the title was then to vest in the Railway Company. Record pp. 32–34, 38–39 and 40–45.

This agreement was intended to be embodied in the contract referred to in appellant's petition as Exhibit A, the rental reserved therein, $1408, representing the exact interest due at eight per cent. on the $17,600 advanced by the Oil Company. Acting upon this understanding the two Companies conducted all their mutual dealings. The Railway Company *credited* the *Oil Company*, on *its books of account, with the sums so expended on its behalf, in the purchase of the rolling stock in question, with eight per cent. interest*, and charged up against it on the same accounts the amounts due for its services to the Oil Company; and, inverting the order, the *same debit and credit items were entered upon the books of the Oil Company*, the balances, from time to time, so appearing due the Oil Company, representing the dues

to it, by the Railway Company on the purchase of its rolling stock. The last of such statements was made out by the President of the road against the Oil Company about the time of the appointment of the receiver herein, and *showed a balance due the Oil Company on the purchase of the rolling stock of $7,023.26.* Record pp. 33–34.

When the receiver was appointed, the court directed that the existing contract for the purchase or use of rolling stock be continued in force. Record p. 11.

This order was made without the knowledge or solicitation of appellant, but related to the rolling stock in controversy, inasmuch as the evidence shows that the Railway Company had absolutely no other, either in use or under contract. Proceeding under this order and authority, the course of dealings between the receiver and appellant continued as it had been before his appointment, until after the 1st day of January, 1887. In February following, for the first time, the appellant was advised of a contention by the receiver that the Railway Company had not obligated itself to pay for the rolling stock it had contracted, as stated, to purchase in 1883, but that as to it, the Railway Company, the whole transaction was by him considered a mere privilege to purchase dependent, both on the inclination of the Railway Company and its own estimate of its ability to consummate such purchase, and that he would not be bound by it. Thereupon, under the aforementioned original agreement, the Oil Company exhibited its intervening petition, and asked the court to enforce the dues and rights secured and accruing to it under an equitable and just interpretation of the terms of the aforementioned original agreement.

There was then due appellant on this purchase a balance of $6,732.15, which sum was a prior equitable charge on

the earnings of the road during receivership, much the more so on the earnings expressly reserved to discharge the same as accruing from the Oil Company's business. And to satisfy which the court should have extended a prior lien to the corpus of the entire property, if necessity should so demand. The receiver answered, averring, first, that by its *admitted payments* to the Oil Company the Railway Company had become the *owner* of about a *two-thirds interest* in the said engines and cars, or of *an undivided interest therein in the ratio of its said payments to the total price it had contracted to pay for the same;* and then suggested in conclusion, that an option had been conferred upon the Railway Company which it had never exercised, whereby it had become entitled to recover from the Oil Company the total amount *previously* and *mutually applied* by the two companies toward *the settlement of their rolling stock account.* Record pp. 22–24.

To this cross-petition appellant filed an answer, setting forth, with particularity, the nature of the contract between said companies and their mutual dealings under it. It denied any title of the receiver to recover from it any sum whatever for freights hauled, first, for the especial reason that prior to the time of the appointment of the receiver the two companies had had a full settlement of all matters of account, including the items for freight services named, "which said settlement, accounting, applica-"tion of payments, and discharge of mutual charges, and "indebtedness, respondent is advised, is final and conclusive "between the parties thereto, and the said receiver cannot "now be heard to object to the same;" and for the further reason that the indebtedness due it arose from an obligation incurred in, and necessary to, the carrying on of the

Railway Company's business, which earnings, as accrued and accruing, it insisted it still had the right to retain and apply in the same manner. Record pp. 27–28.

Upon the pleadings so made up, appellant took the depositions of the presidents and general managing officers of the two companies, in support of its averments. Their testimony placed the character of the entire transaction, and the interest of the parties to it, beyond the limit of controversy or contention. After the coming in of this proof, appellant moved for the striking from the files of the receiver's cross-petition, and against the granting him of any relief as prayed for, because of lack of authority in him so to sue; because the earnings sued for were not covered by, nor recoverable by him under the bondholder's mortgage or security; and because the officers of the Railway Company had made a previous *bona fide* application of them. Record p. 90.

This motion was overruled. A decree was entered in the receiver's favor on his cross-petition for $9,944.41, and a final decree entered denying appellant any manner of relief, dismissing its petition for the enforcement and collection of its claim for $6,732.15, as balance due it by said Railway Company on its purchase of said rolling stock, and in addition thereto, decreeing that said Oil Company pay to the receiver the sum of $3,729.82, held and claimed by it as justly applicable to the extinguishment *pro tanto* of the said balance of $6,732.15. Whereupon appellant prayed and has prosecuted these appeals—numbers 1138 and 1139.

The present appeal is from the $9,944.41 decree, rendered on the receiver's cross-petition.

BRIEF AND ARGUMENT.

I.

The motion to dismiss is without a show of right. An appeal was prayed in open court and there granted; a proper appeal bond was, therefore, tendered to the judge of the district, in due time, duly executed, and by him approved, *with the security thereto*; and, afterwards, the record was filed and the cause docketed as required by the rules of the court. Every step requisite to perfect the appeal has been taken in utter conformity to law.

An appeal bond, signed by one surety only, and that surety a corporation, will support an appeal. There is nothing in the general laws of Mississippi, relative to corporations, that will disqualify a corporation so created from becoming surety. Appellee's counsel *stop short* of giving *all* the statutory law on the subject. The law imposes no restrictions upon the grant of any and all powers a corporation may desire to exercise. It is conclusively presumed that the judge who attached his approval to the bond, did so after an examination which satisfied him of its entire sufficiency, of the right of the surety, *under its charter*, to assume such an obligation, and that such charter rights were subject to be granted and exercised under statutes in force at the time of its organization.[1] If no appeal bond had been given, the motion to dismiss would not be sustained without giving appellant an opportunity to file one.

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1 Laws of Mississippi, Appendix page 20.
Morawetz on Private Corp., § 696.
Mexican Construction Co. v. Rensens, 118 U. S. 49.

The grant of appeal in open court, and the filing of the record and docketing the cause in this court, give jurisdiction. A defective bond can always be corrected on a new bond supplied.[1]

There is not shown any sufficient color of right to a dismissal, to make it proper for the court to entertain a motion to affirm with the motion to dismiss, and the motion to affirm should be denied.[2]

II.

An inspection of the record fails to disclose that the appeal was taken for delay only, and for that cause is subjected to affirmance. A bare reading of it discloses that appellant has at issue meritorious contract rights of substantial amount; and that there are equities subsisting between appellant and the bondholders represented by their receiver, which require some degree of examination and consideration for fair determination and adjustment.

This contract upon which appellant's original petition was based, and the circumstances leading to its execution, have been stated. It is appellant's right that a full hearing and argument of those questions on the merits be extended, and that the cause be retained for that purpose.

The contract as written, is a fair embodiment of the agreement of the parties.[3] The initial recitals that the Oil Company, has *agreed*—with whom, and for whom?—to

1 Hewitt v. Filbert, 116 U. S. 142.
Brown v. McConnell, 124 U. S. 489.
Stewart v. Masterson 124 U. S. 493.

2 Davis v. Corbin, 113 U. S. 687.

3 Copy of Contract, Appendix page 20.

purchase certain named rolling stock, from certain works, and at certain prices, imports an action undertaken on its part, at the instance, and for the benefit, of some one else. From the face of the contract, it is patent that the purchase throughout was, in fact, made by the Railway Company *through* the Oil Company, and that, as its security for such advances, the Oil Company was to assume the attitude of *original vendor* and make a *conditional sale* of the property to the Railway Company—the title to it, however, to remain in the Oil Company, only, "*until purchased by said Railroad Company* in the manner hereinafter provided." The first clauses of the contract relate, therefore, to the security which the Oil Company shall have for the advances named, embracing both a reservation of title to itself—conceded by appellee's counsel to be valid under Mississippi decisions[1]—and, also, an undertaking common to all contracts of this character, to keep the rolling stock in repair and *subject* to delivery to the Oil Company, *upon its demand*, in case of failure or refusal on the part of the Railway Company to meet its obligations at maturity.

The second clause of the contract embraces the *unequivocal agreement* of the *Railway Company to purchase, at a day named*—without any express, or inferential, condition, option, or stipulation, whereby such matured liability was to be escaped or avoided, *save only* by the *prepayment* of the balance due, to stop the running of the so-called *rent*. The third stipulation provides a definite mode for the liquidation of the indebtedness due for the stock—principal and interest—denominated rent, a withholding by the Oil Company of certain earnings of the Railway Company, to

1 Duke v. Shackleford, 56 Miss. 552.

be credited, *first*, on the *rental*, and, next, the surplus "*to go as a credit upon the purchase money of said property.*" Interest on this surplus is allowed in exactly the same manner as is provided by the law merchant and Mississippi statutes, in all cases of partial payments on current indebtedness, and as a set-off against the interest stipulated to be paid in the way of rental. Record p. 26.

The manifest scheme, *which is, in all things, legitimate*, was, that the Oil Company should, and did, advance the money necessary to purchase the rolling stock for the Railway Company, and that the Railway Company should pay the Oil Company its advances, with eight per cent. interest, in installments, from freight earnings, as the services should be performed. The limitation of the contract, that is, the time the purchase money for the rolling stock should become due, was fixed at such a time as the parties estimated would be sufficient to enable the Railway Company to pay for the stock from such earnings; with this only *option* in favor of the Railway Company, the right to purchase before the expiration of the limit fixed—which would operate to determine the payment of *rental;* in other words, put at an end the confessed relation of debtor and creditor, created thereby, and then and now subsisting between the two companies. And when, subsequently, it became manifest that the time so fixed had not been sufficient to enable the Railway Company to discharge its full indebtedness to the Oil Company, the limit was extended for an additional year, with the statement from the President of the Railway Company, that he would be able *to pay the whole balance off during that time.* Record p. 39. Disregarding its form, the contract, therefore, was

in effect, a manifest sale of the property to the Railway Company, under its *express agreement to purchase* at a given price, with the title reserved in the vendor until the purchase money should all be paid.[1] Payment of the interest due on the purchase money was provided for, as stated, by colorable payments of rent, and the surplus earnings remaining were to remain in the hands of the Oil Company —not "as a reserved fund belonging to the Railroad Company"—as counsel say, but were *to be applied* and *to go as a credit upon the purchase money of the property.* Taking only the Railroad Company's accounts, and the testimony of its President alone, the contention of the receiver, as to any *option* on that company's part, is flatly contradicted and denied. Record pp. 32–34.

The decisions upon contracts of this character are numerous in England and America. Many recent cases hold that where it is apparent that the contract, though nominally a *hiring*, is in reality a conditional sale, the courts will so regard it, looking to the substance rather than the form.[2] The intention of the parties and the practical construction put by them upon their contracts, prevail in every instance over the mere language of the instrument.[3]

This being true, the contract stands before the court as stated, as, in effect, a *conditional sale*, with a right of rescis-

1 Harkness v. Russell, 118 U. S. 663.

2 Benjamin on Sales, Corbin's 3d English and 4th American editions of 1884, §§ 393 and 425–433, and cases cited.
Hervey v. Locomotive Works, 93 U. S.

3 Donahoe v. Kettrell, 1 Clifford 141.
Irwin v. United States, 16 Howard 523.
United States v. Gibbons, 109 U. S. 200.
Mobile, &c., Ry. Co. v. Jurey, 111 U. S. 592.
Harkness v. Russell, 118 U. S. 663.
Topliff v. Topliff, 122 U. S. 122.
District of Columbia v. Gallagher, 124 U. S. 505.

sion on the part of the *vendor*, in case the purchaser shall fail in payment of the purchase money. The vendor, however, has never sought rescission, but by its suit insists that the purchaser shall complete its obligation to purchase, by the continued making of payments which it is entirely able to make and to meet. In no theory of the case, therefore, could a decree be entered against appellant for the amount that has been received by it, and mutually applied to the payment of purchase money.

The Railway Company has retained, and continues, the uninterrupted possession, control and use of the rolling stock by the express assent of the Oil Company. In no event could it tender or surrender the property to appellant and thereby become entitled to recover back the payments it has made towards its purchase. Even if the Oil Company had proceeded to exercise the right reserved to the vendor in all such cases, to regain possession of the property, no action would lie against it by cross-petition, or otherwise, at the suit of the Railway Company, or its receiver, to recover what was paid on account of such purchase.[1]

The receiver, however, does not base his rights to recover on any such ground. His case rests solely on the assertion of an *option* in the Railway Company to purchase or not, as its financial condition might warrant, or as it should elect. It is contended, in opposition, that there is nothing, either in the language of the contract, and the known intention of the parties to it, or their conduct, acting under, and interpreting it, which will lend support to such a claim.

There is a manifest distinction, well stated by the au-

1 Corbin's Benjamin on Sales, §§ 425–433.

thorities, between a hiring or lease, with the *privilege* or *option* to the lessee to purchase, and possession, as in the present instance, under a contract of *conditional sale*, or *unconditional undertaking to purchase.*

The language of the contract is plain and unaccompanied by any limitation of the obligation, or liability assumed. "The said Railroad Company further *agrees that it will, on* "*or before the said 1st day of January, 1886, purchase all of* "*said property from said Oil Company, and pay for it in cash* "*the cost price thereof.*"

This clause immediately succeeds the clause from which counsel have evolved their conception of the option contended for, as though it were, thereby, purposely intended to exclude from the contract and wholly preclude any such doubt or hypothesis as that they assert.

This "*insolvency clause*" is not coupled with, nor embodied in, nor as any part of, the *immediate contract* of the Railway Company *to purchase.*

It is only a part of the precedent scheme, whereby title was to become vested in the Oil Company, delivery of possession made to the Railway Company, *under contract*, on its part, *to purchase*, and the engines and cars required to be properly cared for as a continuing security to the Oil Company for the large advances then made by it on behalf of the Railway Company; so that, in the event it should become necessary for the Oil Company, in default of payment by the Railway Company, to resort to such security, the Railway Company would be in position to turn the same over to the Oil Company in good order and condition. It was a simple condition annexed to the use of the prop-

erty, to preserve it from destruction and waste, for the joint benefit of both companies, always incorporated in contracts of this character, and which has never been held to affect the title to the property in question, nor the contract rights and obligations of either party, with regard either to title or liability. The attitude of the parties before, and at the making of the contract, and their long course of dealings under it, show that such was the purpose and the only purpose intended to be answered by the clause referred to.

And when an extension was granted, the agreement was "that the time for the *purchase by the Mobile & Northwestern Railroad Company of said engines and cars*" was extended, and *not* that the *privilege* or *option* to purchase was, in any manner, *granted*, *conferred* or *extended* to it.

Aside from these considerations, mere inability to pay, as counsel insist, does not operate as a release from unconditional contract obligations. A man may, by positive contract, undertake to do what he will, and unless he shield himself by proper conditions, he will be held to his undertakings; and in all contracts, such conditions as are made impossible by the default of the party, or otherwise than by the act of God, are treated as direct promises. What could or should be done, will be enforced. Mere insolvency is no answer to process for debt.[1] Even if it be conceded that there was an option in the company dependent on its ability to purchase, the receiver did not exercise it on the day fixed. He failed to notify appellant of his election until long after January 1st, 1887, and *has never*

1 Pollock on Contracts, 4th Eng. ed., marginal pp. 380–388.

yet turned the rolling stock over to appellant "in good order" or *otherwise, nor offered to do so.*[1]

Again, the receiver must be held estopped to set up any such option, or right to elect under it, because his ability to purchase, and the necessity for him to do so, to operate the road, are averred and proved by appellant; and any supposed inability of the company to purchase, is waived by appellant in his answer to the cross-petition, and ample opportunity offered the receiver to complete the purchase the contract calls for. Record p. 28.

Conceding, further, the option claimed, and that the receiver, under the surrounding circumstances, was in suitable attitude, as late as the middle of February, then to exercise the same, still the court was without power to grant the relief sought in his cross-petition, and should have dismissed it.

The sums in controversy were paid to the Oil Company by the president and general managing officers of the Railway Company before the appointment of the receiver, under the belief that in law the Railway Company was under contract to make such payments. Record pp. 32–34, 38–45. Money paid under a mistake of law cannot be recovered.[2]

The earnings sought to be recovered were not covered by the terms of the mortgage, while the mortgagor remained in possession.[3]

The money had previously been appropriated by the officers of the Railway Company and acquittance executed

1 Texas & Pacific Ry. Co. v. Marlow, 123 U. S. 687.

2 Pollock on Contracts, 4th Eng. ed. p. 409.
Bank of U. S. v. Daniel, 12 Pet. 32.

3 Jones on Railroad Securities, §§ 114–120.

by them therefor, and their authority to do so cannot now be *questioned* nor revoked.

But the contention is made that the contract in question is void, *ab initio*, because of certain stipulations in contravention of public policy. The specific agreement not to haul seed in bulk for any other corporation or person, is certainly void. That to give all needed facilities and preferences to the Oil Company is not. It must be held to mean only facilities and preferences authorized by law; under the rule that all inferences and presumptions where possible, must be indulged in favor of and to support the legality of the several stipulations of a contract.[1] Conceding, however, they are both illegal, the contract will stand notwithstanding, with their expurgation.

They are separable and independent of all other stipulations.

The rule cannot be controverted that where there are several separable promises, and the *consideration is tainted with no illegality*, though some of the promises are illegal, those that are legal will be enforced.

To avoid the unquestioned force of this proposition, the efforts of counsel are directed to demonstrate the "interdependent character" of the contract, that they may deduce thence its entire illegality. Their position and arguments, however, are based on, and proceed from, an erroneous statement of the language of the contract. We submit that on page 18 of their brief they *misquote*, and then found their conclusions on nothing save such erroneous quotations. A legitimate *eo instante* is transformed into an ultra unlawful provision. The contract itself contains only the agreement of the Railway Company "to use and operate said

1 Chicago & Alton Ry. Co. v. Wiggins Ferry Co., 119 U. S. 616.

"property upon the line of its railroad, and to turn the "same over, should it at any time violate its *agreement*, "upon the demand of said Oil Company." Clearly this refers to, and embodies, only, an agreement to operate the rolling stock on the line of its own road. It was with this understanding, and for this purpose, that the property was bought and sold by the Oil Company, and it was proper that the contract should express as much. And further than this, the force of the clause cannot be extended by any manner of artificial construction.

This much, to state the facts as they are, and to avoid the danger of any misapprehension of the true terms of the instrument, we may proceed to apply the rule invoked to the point at issue.

In the first place the *entire consideration moving from the Oil Company is pure, unquestioned* and *untainted*, the purchase and sale to the Railway Company of rolling stock at the factory prices; and there is, then, on the other hand, the separable undertakings, on that Company's part, to use and operate the same on the line of its road, and to consummate its purchase thereof within a certain time. These undertakings performed by the Railway Company, and its title becomes absolute. Certainly no such disassociated stipulations as those referred to can be held to avoid the contract in all its parts.[1]

The fact that they are separable in law, is demonstrated most clearly by the very facts in the case.

There has never been any enforcing of, nor desire on the part of the Oil Company, to enforce those particular ob-

1 Erie Ry. Co. v. Union Locomotive & Exp. Co., 35 N. J. Law, 240. Greenhood on Public Policy, Rule XXII–XXIII, p. 20, et seq. Pollock on Contracts, M, p. 320–1.

jectionable stipulations of the contract above referred to. Much more than this, the Oil Company has never sought performance of those other certain parts of the contract which, while not subject to the criticism of illegality are repeatedly denominated by counsel as harsh and oppressive —the requirements that the Railway Company should build seed houses, and have its agents buy seed, and perform other like services for it.

The Oil Company avers that it has always disowned any desire to seek performance or enforcement of any such privileges. It sought no such relief in its petition, and makes proof of the fact that all seed houses and agents were paid for by itself, *exclusively with its own funds*. Record pp. 26–7. The contract was, therefore, purged of any illegality by the conduct of the Oil Company under it, in refusing to accept any illegal benefits, and by reason of its failure to seek relief as to any of such matters in this proceeding. Appellant does not require the aid of any illegal or questionable stipulation to establish its tittle to the character of the relief prayed for by it in this proceeding.[1]

The objectionable features were manifestly engrafted on their contract without the procurement of the Oil Company. It is entirely competent for parties, by subsequent acts, or agreements, to modify or annul the terms of a written contract in any desired particular.[2]

We suggest, further, as to this feature of the case, that, if in any particular, there may be a doubt as to the legality of any of the provisions of the contract, and a further

1 Wilkinson & Co. v. Reily, 47 Miss. 313.
2 Teal v. Bilby, 123 U. S. 578.

doubt as to whether any confessed illegal provision should be extended to destroy the validity of the entire contract, the rule requires that the contract should be construed throughout so as to uphold its legality.[1]

Taking it at the most appellee contends for, and viewing the contract as void *ab initio*, the decree of the court below cannot be supported.

The parties are *in pari delicto*. The whole record shows that there was never any effort made by the Oil Company to do aught but aid the Railway Company as much as, and in every way it could, and that at a time when the holders of its first mortgage bonds failed to enter an appearance for its relief. No undue advantage has been shown ever to have been taken of the Railway Company, and no exercise of undue influence can be presumed. Fraud, in all its forms, must be proved. The parties, therefore, would stand *in pari delicto*, and the court would be powerless to grant any relief, either to require the Railway Company to return the rolling stock, or to decree that the Oil Company refund the money derived from and due for its use and employment.[2]

But if not *in pari delicto*, then the Oil Company has paid the outstanding valid commercial obligations of the Railway Company for operating expenses to the amount of $8268.56. Such payments can be made out and shown without recourse to the contract.[3] They were taken up by the Oil Company and are filed as Exhibits Nos. 1, 2, 3 and 4 to the deposition of its secretary and treasurer.

Record, pp. 41 and 46.

1 Hobbs v. McLean, 117 U. S. 567-575.
United States v. Central Pacific Ry., 118 U. S. 235.

2 Block v. McMurry, 56 Miss. 217.

3 Wooten v. Miller, 7 S. & M. (Miss.) 380.
Holt v. Bartow, 42 Miss. 711.
Gilliam v. Brown, 43 Miss. 641.

This sum is an equitable set-off against any and all claims held against it by the Railway Company or its receiver, no matter from what source arising; and at the same rate of interest the court directed the commissioner to charge against the Oil Company, amounted to and represented an independent aggregate indebtedness to the Oil Company, at the date of the decree below, exceeding $10,000, much more than the decree against it in the receiver's favor. Against this indebtedness, shown by the books of account of both companies, aside from any contract, the Oil Company had applied the indebtedness due by it for freight services. And such application had been *expressly and subsequently approved and confirmed* by the manager of the Railway Company.

A receiver's rights are no higher, in any regard, than those of the owner in possession. Legal and equitable claims are enforcible against him in the same manner. He enters upon the discharge of his duties, and, in the discharge of them, is alike subject to be encountered by the like equities that could be opposed to demands if prosecuted by the Company itself. The court should have recognized this fact, and permitted the settlement of the parties to stand.

We submit to the court, in conclusion, that the questions involved in, and presented by, this appeal, are not of that character that the court is inclined to consider on a motion to affirm.

An affirmance, at any time, would seem improbable. Appellant desires, in good faith, at the proper time to present fully the merits of the present appeal, confident that such presentation will result in a determination favorable to its contended rights.

Wm C Calhoun
Counsel for Appellant

APPENDIX.

Acts Amendatory of "An Act in Relation to Corporations and Other Associations," Chapter 38 of the Revised Code of Mississippi, A.D. 1880.

AN ACT to extend the provisions of Chapter 38 of the Code of 1880 in relation to Corporations and other Associations, and for other purposes.

Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That all corporations except cities and towns, and express, telegraph and railroad companies, may be created in the mode and manner and with all the rights, powers, privileges and immunities as provided in Chapter 38 of the Code of 1880.

Section 2. *Be it further enacted*, That all corporations created under this act and of said chapter 38, shall have, in addition to the powers, privileges and immunities granted in Chapter 38 of the Code of 1880, the following rights, powers, privileges and immunities: That their capital stock shall be unlimited in amount and may be increased by the stockholders from time to time; that they may hold and own real and personal property to any amount, may sell, exchange and encumber the same; that they may borrow money and secure the payment of the same by a mortgage or deed of trust upon their property and franchises; that they may issue their bonds and secure the same by a mortgage or deed of trust upon their property and franchises, and may sell, exchange, pledge or hypothecate such bonds, and have such other rights, powers and privileges as are necessary and proper to carry into execution the purposes of their organization.

Section 3. *Be it further enacted*, That in all actions brought by third persons against corporations created under this act, it shall not be a defense to such action that there was any defect or informality in the organization of such corporation.

Approved March 7, 1882.

AN ACT to extend the provisions of Chapter 38 of the Code of 1880, and Chapter 26 of the Acts of 1882, in relation to corporations, and for other purposes.

Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That the charters of all corporations, howsoever created, except cities and towns and express, telegraph and railroad companies, may be amended or altered in the same manner that is provided for the creation of corporations under Chapter 38 of the Code of 1880, and under an act entitled "An Act to extend the provisions of Chapter 38 of the Code of 1880, in relation to corporations and other associations, and for other purposes," approved March 7, 1882. That no such alteration or amendment shall be made except by the assent of a majority of the stock of the corporation or association, which assent, certified to by the president and secretary, shall accompany the application for the proposed alteration or amendment, and the alteration and amendment shall be binding on all the stockholders unless those dissenting thereto shall, within thirty days after knowledge that the same has been made, enjoin the corporation or association from acting under such alteration or amendment; and if any stockholder or member shall fail so to do, he shall be estopped to deny the validity or binding effect thereof.

Approved March 13, 1884.

SECTION 1033, OF CHAP. 38.

"Mortgages or deeds of trust subordinate to certain claims."

§ 1033. No mortgage or deed of trust conveying the income on future earnings of any corporation, or the rolling stock of any railroad company, shall be valid against debts contracted in carrying on the business of the corporation, nor against liabilities incurred by railroad companies as carriers of freight and passengers, or for damages sustained by persons or property; but such mortgage or deed of trust shall be valid as against any claim in excess of five thousand dollars for damages to any person.

COPY OF CONTRACT TAKEN FROM THE RECORD.

This contract, made and entered into on the 6th day of October, 1883, by and between the Sunflower Oil Company of Clarksdale, in the State of Mississippi, and the Mobile & Northwestern Railroad Company, both corporations under and by virtue of the laws of the State of Mississippi, witnesseth:

That the said Sunflower Oil Company has this day agreed to purchase of the Baldwin Locomotive Works, in Philadelphia, Penn., two locomotive engines and tenders complete, named, respectively, Le Flore and Yazoo, at the price of seventy-six hundred dollars each, making together the sum of fifteen thousand two hundred dollars, and to invest the further sum of two thousand four hundred dollars in box and flat railroad cars; all of which property the said oil company agree to lease unto the said railroad for the full period of time up to January 1st, 1886, at and for the sum of fourteen hundred and eight dollars per annum, said rental to be due and payable on the last day of each and every month, while this contract continues, in monthly instaliments.

Said locomotive engines and cars are to be bought and paid for in the following manner, to-wit: The engine Le Flore and said cars are to be paid for by said oil company in cash, and are at once to be and continue its property until purchased by said railroad company in the manner hereinafter provided, and said locomotive engine Yazoo is to be purchased of said Baldwin Locomotive Works upon the obligation of said railroad company, guaranteed by the mercantile firm of J. T. Fargason & Co., of Memphis, Tenn., which guaranty the said oil company has agreed to procure for said purpose; which obligation is to be paid to said Baldwin Locomotive Works six months from this date, together with six per cent. interest, and until the payment of said obligation the title to said locomotive Yazoo is to be and remain in said Baldwin Locomotive Works. Should said railroad company pay said obligation at maturity the title to said engine is to be in it, but should the said J. T. Fargason & Co. have to take up said obligation on account of their said guaranty, then the title to said locomotive Yazoo shall be and remain in said Sunflower Oil Company until said railroad company shall acquire title to it and the other said property in the manner hereinafter set forth.

Should said railroad company promptly meet said obligation to

said Baldwin Locomotive Works for said engine Yazoo, then thereafter the rental of the property above named belonging to said oil company shall be eight hundred dollars per annum, payable in monthly installments at the end of each calendar month which this contract has to run.

The said railroad company further agrees and binds itself to take all proper care of said locomotive engine, tender, and cars, and turn the same over to said oil company in good order and condition at the end of this contract, should said railroad company be then unable to purchase the same, at the price hereinafter mentioned; and said railroad company further agrees to use and operate said property upon the line of its railroad and to turn the same over, should it at any time violate its agreement, upon the demand of said oil company.

The said railroad company further agrees that it will, on or before said 1st day of January, 1886, purchase all of said property from said oil company and pay for it in cash the cost price thereof, but said railroad company shall have the right at any time before said 1st of January, 1886, to purchase the whole of said property by paying the cash price thereof to said oil company, and in the event it does so the contract of rental hereinbefore set out shall immediately cease and determine, but such purchase shall not have the effect of—anywise impairing this contract so far as its other terms are concerned.

And said railroad company further agrees that it will within sixty days from this date erect houses at four, or more if necessary, of the depots on its said road for the purpose of receiving cotton seed in bulk for said oil company, and that it will have scales for weighing seed by the wagon-load, and that it will haul seed in bulk from the various points along the line of said railroad to Clarksdale, Miss., for said oil company. It is further agreed that the agents of said railroad company along the line of its road will weigh cotton seed, purchase same, if desired, all free of cost for any service to said oil company. The said railroad company agrees that it will haul all sacks for said oil company free of charge, and that it will receive and haul all freights for said oil company at the Mississsppi river opposite Helena, Ark., free of storage or commission. It is understood that the freight to be paid by said oil company to the said railroad company for hauling cotton seed in bulk or in sacks or

for any product of the mill or for supplies for said mill, shall be at reasonable rates, to be fixed at various times by the presidents of said two companies, but the freight on seed in bulk is not to exceed $1.75 per ton and freight on seed in sacks is not to exced $2.00 per ton.

It is further agreed that said railroad company will not haul cotton seed in bulk for any other corporation or person, nor permit its agents to purchase or pay for cotton seed for any other corporation or person. The said railroad company further agrees to put in a switch or side track at Clarksdale, so as to reach the mill of said oil company, so as to load and unload freight at said mill.

It is further agreed that said railroad company will give all needed facilities and preference to the said oil company to enable it to control all cotton seed along the line of said railroad as it now is or as it may be while this contract is in force. All freight earned by said railroad company for hauling seed, supplies, or products of any kind for said oil company is to be credited on amount of the rental of said property, and should there remain a surplus after paying rent it is to remain in the hands of said oil company and go as a credit upon the purchase-money of said property. Interest is to be allowed said railroad company on such surplus at the rate of eight per cent. per annum. Said railroad company is to furnish said oil company a statement of freight due it at the end of each month while this contract continues, and the same is to be credited in the manner above stated.

This contract is to continue in force until the 1st day of January, 1886.

Witness the signatures of said companies, by their respective presidents, this day and year first above written.

THOS. T. A. LYON,
Pres't of Mobile & Northwestern R. R. Co.

J. T. FARGASON,
Pres't Sunflower Oil Co.

We, the undersigned, pres't and sec't'y *pro tem.* of the Mobile & Northwestern Railroad Company, certify that on the 8 day of Oct., 1883, at a meeting of the directors of said company, held at their office in Memphis, Tenn., the following resolution was passed:

Resolved, That the contract made between Thos. T. A. Lyon, pres't of the Mobile & Northwestern Rail. Co. and Jno. T. Farga-

son, pres't of the Sunflower Oil Company, at Clarksdale, Miss., under date of Oct. 6, '83, regarding the purchase of locomotive and cars and hauling seed, &c., is approved and ratified.

THOS. T. A. LYON, *President.*
JNO. R. FLIPPIN,
Sec. pro tem.

It is hereby agreed between the Sunflower Oil Company and the Mobile & Northwestern Railroad Company that the time for the purchase, by said Mobile & Northwestern Railroad Company of the engines and cars of said Sunflower Oil Company mentioned in the foregoing contract be extended for one year from the first day of January, 1886, and that said contract and all the provisions thereof, with the change made in the time for the purchase of said engine and cars as aforesaid, shall be extended and continue in force until the 1st day of January, 1887.

MOBILE & NORTHWESTERN RAILROAD CO.,
By THOS. T. A. LYON, *Pres't.*
THE SUNFLOWER OIL COMPANY,
By J. T. FARGASON, *P't.*

STATE OF TENNESSEE, *City of Memphis:*

Before me, the undersigned, commissioner duly appointed and commissioned by the Governor of the State of Mississippi to reside in the State of Tennessee, and qualified to take acknowledgments of instruments of writing to be recorded in said State of Mississippi, this day personally appeared Thos. T. A. Lyon, president of the Mobile & Northwestern Railroad Company, and acknowledged that said railroad company and he, as president thereof, executed the foregoing two instruments of writing on the days and years therein mentioned.

Witness my hand and official seal this 22 day of September, 1886.

[L. S.] HUNSDON CARY,
Commissioner of Mississippi, at Memphis, Tenn.

STATE OF TENNESSEE, *City of Memphis:*

Before me, the undersigned, commissioner duly appointed and commissioned by the Governor of the State of Mississippi to reside in the State of Tennessee, and duly qualified to take acknowl-

edgments of instruments of writing to be recorded in said State of Mississippi, this day personally appeared J. T. Fargason, president of the Sunflower Oil Company, and acknowledged that said oil company and he, as president thereof, executed the foregoing two instruments of writing on the days and years therein mentioned.

Witness my hand and official seal this 22 day of September, 1886.

HUNSDON CARY,
Commissioner of Mississippi, at Memphis, Tenn.

Filed for record, Sept. 23, 1886, at 2 p. m.

R. N. HARRIS, *Clk*,
By J. ALLEN, *D. C.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

No. 122.

SUNFLOWER OIL COMPANY, *Appellant.*

versus

BENJAMIN WILSON, *Receiver Mobile & Northwestern Railway Company, Appellee.*

Abstract, Assignments of Error, Brief and Argument on behalf of Appellant.

JNO. W. & WM. D. CUTRER,
of Counsel for Appellant.

IN THE

Supreme Court of United States,

OCTOBER TERM, 1891.

No. 122.

SUNFLOWER OIL COMPANY, *Appellant,*

versus

BENJAMIN WILSON, *Receiver Mobile & Western Railway Company, Appellee.*

Statement, Assignments of Error, Brief and Argument on behalf of Appellant.

STATEMENT.

The Mobile & Northwestern Railway Company, in 1877, executed a trust deed, termed in the pleadings, a mortgage, on all its property, to secure an aggregate bonded indebtedness of $250.000. It failed, from the beginning, in payment of interest on the same, and on November 15th, 1886, Moses H. Katzenberger and others, holding a large majority of the bonds aforesaid, and of the past due coupons attached, filed a bill against the defaulting company and other necessary parties, in the District Court of the United States for the Northern

District of Mississippi, to enforce sale of the property and franchises covered by the trust deed, for the payment of the indebtedness aforesaid; and praying for the immediate appointment of a receiver to take control of the mortgaged premises. Record p. 1. Subsequently, the bill was amended, and on December 15th, 1886, Benjamin Wilson, the defendant and appellee in this case, was appointed receiver of the Company. Record p. 9. At the time the original Katzenberger bill was filed, the Railway Company had been in default in its interest payments for periods varying from four and a half to eight and a half years. Record p. 5. Notwithstanding such prolonged and continuous default, the bondholders suffered the entire property to remain in the hands, and under the uninterrupted control and management of the Company, its officers and agents, until the date last stated. During the continuance of this state of affairs, in January, 1883, the President of the Railway Company, Thos. T. A. Lyon, contracted with the Baldwin Locomotive Works, for two locomotives, at a cost of $7600 each, to be completed in the fall of that year. Just preceeding their completion, the only locomotive the Railway Company then had, became permanently disabled; and though the new locomotives ordered were then within a few days of completion, the Company had no money, nor means of securing money, to pay for them. In this strait, and when the bondholders themselves would extend no assistance, on application to the appellant, that Company intervened with the means necessary to avert a total suspension of the Railway Company's business, and a total wreck of the interests of the bondholders. It advanced the means requisite to the purchase of the locomotives and other needed rolling stock that the Railway Company had already contracted to purchase, and, as security for the advances so made, took the title to the property to itself, while the Railway Company, on

its part, agreed to repay such advances, within a stated time, with eight per cent. interest, and undertook to guarantee such repayment by obligating itself that all charges for freights hauled for the Oil Company, should be by it retained, and applied to and for that purpose. When such repayment should thus be effected, the title was then to vest in the Railway Company. Record pp. 32–34, 38–39 and 40-45.

This agreement was intended to be embodied in an agreement and contract reduced to writing between the parties, and filed as Exhibit A, to the original petition or bill filed by appellant against the Receiver of the Railway Company. Record p. 16. See, also, Appendix hereto, p. 5 1-6. The annual rental reserved therein, $1408, it will be noted, represents the exact annual interest due, at eight per cent., on the $17,600 advanced by the Oil Company for account of the Railway Company. Acting upon this understanding and agreement, the two Companies conducted all their mutual dealings. The Railway Company *credited* the *Oil Company*, on *its books of account, with the sums so expended on its behalf, in the purchase of the rolling stock in question, with eight per cent. interest*, at stated intervals, as the same accrued, and charged up against it, on the same accounts, the amounts due for its services to the Oil Company ; and, inverting the order, the *same debit and credit items were entered upon the books of the Oil Company* ; the stated balances, from time to time, sc appearing due the Oil Company, representing the dues to it, by the Railway Company on the purchase of its operating rolling stock. The last of such statements was made out by the President of the road against the Oil Company about the time of the appointment of the receiver herein, and *showed a balance due the Oil Company on the purchase of the rolling stock of $7,023.26.* Record pp. 33–34.

When the day for the repayment in full of the aforementioned advance made by the Oil Company arrived, the Railway Company still owed a balance of several thousand dollars, which it was not able to pay at that time; and at its instance it was "agreed * * * that the time for the purchase "by the Mobile & Northwestern Railroad Company, of "the Engines and Cars" mentioned, should be extended for one year from the original date of maturity, *i. e.*, January 1st, 1886. Record p. 18. Appendix p. 4.

When the appellee was appointed receiver, the Court directed that the existing contract for the purchase or use of rolling stock be continued in force. Record p. 11.

This order was made without the knowledge or solicitation of appellant, but related to the rolling stock in controversy, inasmuch as the record shows that the Railway Company from the time of its rolling stock purchase through the instrumentality of appellant, to final decree in this cause, had absolutely no other, either in use or under contract. Proceeding under this order and authority, the course of dealings between the receiver and appellant continued as it had between the two companies, before his appointment, until after the 1st day of January, 1887. In February following, for the first time, the appellant was advised of a contention by the receiver that the Railway Company had not obligated itself to pay for the rolling stock it had contracted in the early part of the year 1883, to purchase from the manufacturers, and which purchases it had effected, as stated, through the aid of appellant, but that as to it, the Railway Company, the whole transaction was by him considered a mere privilege to purchase, dependent both on the inclination of the Railway Company, and its own estimate of its ability to

consummate such purchase, and that he would not be bound by it. Thereupon, under the aforementioned original agreement and contract the Oil Company, on February 14th, 1887, exhibited its petition or bill against the receiver, and asked the Court to enforce the dues and rights secured and accruing to it under an equitable and just interpretation of the terms of the aforementioned original agreement, and the subsequent contract of the parties, requiring the purchase of rolling stock to be made by the Railway Company on January 1st, 1887.

There was then due appellant on this purchase, a balance of $6.732.15, which sum was a prior equitable charge on the entire earnings of the road during receivership, much the more so on the earnings expressly reserved and pledged to discharge that indebtedness, as accruing from the Oil Company's business, and which earnings only the bill sought particularly to require should be declared a specific trust fund, applicable first to the discharge of the Oil Company's said claim. And to satisfy which, the Court, should under appellant's prayer for general relief, have extended a prior lien to the corpus of the entire property, if necessity should thereafter, so demand. Record pp. 12–15. The receiver answered, averring, first, that by its *admitted payments* to the Oil Company, the Railway Company had become the *owner* of about a *two-thirds interest* in the said engines and cars, or of *an undivided interest therein in the ratio of its said payments to the total price it had contracted to pay for the same;* and then suggested, in conclusion, that an option had been conferred upon the Railway Company which it had never exercised, whereby it had become entitled to recover from the Oil Company the total amount *previously* and *mutually applied* by the two companies toward *the settlement of their rolling stock account.* Record, pp. 22-24.

To this cross-petition, appellant filed an answer, setting forth, with particularity, the nature of the contract between said companies, and their mutual dealings under it. It denied any right, title or authority of the receiver to recover from it any sum or amount whatever, for freights hauled, especially for the reason that prior to the time of the appointment of the receiver, the two companies had had a full settlement of all matters of account, including the items for freight services named, "which said settlement, accounting, application of "payments, and discharge of mutual charges, and indebted-"ness, respondent is advised, is final and conclusive between "the parties thereto, and the said receiver cannot now be heard "to object to the same;" and for the further reason that the indebtedness due said Oil Company arose from an obligation incurred in, and necessary to, the carrying on of the Railway Company's business; which earning, as accrued, and accruing, it insisted it still had the right to retain and apply in the same manner. Record pp. 27–28.

Upon the pleadings so made up, appellant took the depositions of the presidents and general managing officers of the two companies, in support of its averments. Their testimony placed the character of the entire transaction, and the intentions of the parties to it, beyond the limit of controversy or contention. After the coming in of this proof, appellant moved for the striking from the files of the receiver's cross-petition, and against the granting him of any relief as prayed for, because of lack of authority in him so to sue; because the money sued for was for earnings not covered by, nor recoverable by the receiver under the bondholders' mortgage or security; and because the officers of the Railway Company had made a previous *bona fide* application of such. Record p. 90.

This motion was overruled.

An order of reference was made to a commissioner for the stating of an account showing the amount retained by the Oil Company from freights hauled for it by the Railway Company, less rental, from October 6th, 1883, to January 1st, 1887. The report of the commissioner was confirmed; and a decree was entered in the receiver's favor, on his cross-petition, for $10,550.41, with costs; and, at the same time, a final decree was directed and entered, denying appellant any manner of relief on, and dismissing, its bill for the enforcement and collection of its claim of $6,732.15, and interest, as balance due it by the Railway Company, on account of its purchase of rolling stock; and in addition thereto, decreeing that the Oil Company pay to the receiver the sum of $3,729.82, held and claimed by it as justly applicable to the extinguishment, *pro tanto*, of the said balance of $6,732.15. Whereupon appellant prayed and has prosecuted these appeals—numbers 122 and 123.

The present appeal is from the $10,550.41 decree, rendered on the receiver's cross-petition.

ASSIGNMENTS OF ERROR.

The appellant specifies, and specially assigns, as error, in the Court below, its action in the following stated particulars, to wit :

1. Because the Court erred in its final decree in this cause, in that, while by said decree, it dismissed the original bill or petition of appellant, it nevertheless entered a decree in favor of appellee on his cross bill or petition filed therein.

2. Because the dismissal by the Court, on final decree, of the original bill or petition for relief, presented by appellant, carried with it, and operated as, a dismissal of the said cross bill or petition of appellee, and it was error, and the Court had no jurisdiction, to decree otherwise.

3. Because the Court erred in granting and entering any decree or relief whatever in favor of appellee, on his said cross bill or petition.

4. Because the Court erred in not sustaining the motion of appellant to strike from the files, the said cross-petition of appellee.

5. Because the Court erred in dismissing appellant's petition for the enforcement of its contract rights with the Mobile

and Northwestern Railway Company, and in refusing to grant appellant the specific relief sought thereby, or such other equitable relief as was its due, under its prayer for general relief.

6. Because the Court erred in entering a money decree against appellant, in favor of appellee, for the sum of $10,550.41.

7. Because the Court erred in making the order of reference of August 12, 1887, directing the stating of an account, "showing the amount due from the Oil Company to the Rail-"road Company for freights, from October 6th, 1883, to Janu-"ary 1st, 1887."

8. Because the said Court erred in directing that monthly balances found due said Railway Company by said Oil Company on account of the indebtedness created by said order of reference, and subsequent decree, bear interest in favor of said Railroad Company at the rate of 8 per cent. per annum, instead of 6 per cent., the rate prescribed by the Mississippi Statute.

9. Because the said Court erred in confirming the report of the Commissioner appointed, and acting in compliance with the terms of the aforesaid order of reference.

BRIEF AND ARGUMENT.

It is contended on behalf of appellant, that the judgment of the District Court in this cause, should be reversed for the manifest errors assigned.

In furtherance of this contention, and in the presentation of our view of the questions raised on the record by the assignments of error, we shall shorten the discussion and argument upon our part, as much as we can, by considering the assign ments stated in direct order.

The First, Second and Third Assignments seem full of merit, and conclusive of a favorable determination of this appeal.

Considering them together, the record shows that the original pleading filed by appellant in this cause, is a Bill in Equity, exhibited by the appellant, against appellee, the defendant, receiver of the Mobile and Northwestern Railway Company, for the continuance and ultimate enforcement of a contract, by which the said Railroad Company had undertaken to purchase and pay for a certain rolling stock in a manner which made appellant's claims for the balance of the purchase price of such rolling stock, superior to the mortgage lien of the bond-holding creditors of the said company. This bill contains prayers for specific and general relief. Record, pp. 12–15.

The answer of the receiver denied, generally, the right of appellant to any relief, and concluded with an allegation that the contract which the bill had been filed to enforce, was in effect, and operative, as to the Railway Company, only as an option to purchase; that it had not elected to exercise that option, and that there was the sum of $10,258.86 due the Railway Company, in the hands of appellant, which he was entitled to recover. The prayer was that the answer be taken as a cross-petition for the recovery of said $10,258.86; and for general relief. Record, pp. 22 and 24.

The cause was heard on bill, answer, cross-bill and answer thereto, and proof; and, thereupon, the Court rendered a final decree dismissing the original bill or petition. Record pp. 91–92.

In the same breath, the Court rendered a money judgment over against appellant, on the receiver's cross-petition, for the $10,000 alleged therein to be due the Railway Company, awarding execution. Record pp. 90–91.

We insist on the rule that a cross-bill or petition is a mere dependency on the original pleading, as a matter and method of defence; and the dismissal of the original bill operates to dismiss the cross-bill.

The facts of the case at bar are such that the rule is applicable in all its rigidity.

The relief sought by the cross-bill was of a purely legal character; in effect, an action for money had and received, or for a balance on an account stated.

There are no authorities which will warrant the retaining of a cross-bill, or petition, for the rendition of a personal

money judgment, or that will sustain such a judgment when rendered, where the Court, on final hearing on the merits, dismisses the original bill, refusing to grant any relief upon it.

The rule in Mississippi is the same as that established by this Court; and there can be no exception in principle or practice, engrafted on it, that can be made, by any manner of tortuous reasoning or construction, to embrace and save the judgment in this cause.*

We contend, therefore, that the Court having already determined the merits of the controversy, as raised by the original bill, against appellant, it had no jurisdiction to enter a decree against appellant on the cross-bill; that the only decree it did have jurisdiction to make, under the circumstances, having so determined, was an order of dismissal of the cross-bill, as well; and the Court having done otherwise, its action in entering a judgment against appellant was erroneous, as the assignments named, specifically state.

In further support of the third ground of error, we call the Court's attention to the fact that the answer of the receiver contains statements in conflict with the allegations and prayer of the cross-petition. It states, first, that the Railroad Company in question, by its payments to appellant, "is the owner of "nearly two-thirds in value of the rolling stock named; next, "that by virtue of said payments, the said Railroad Company

*Cross *vs.* Valle, 21 Wall. (U. S.) 1.
Dows *vs.* Chicago, 11 Wall. (U. S.) 108.
Gilmer *vs.* Felhour, 45 Miss. 627.
Jacks *vs.* Bridewell, 51 Miss. 890.
Belcher *vs.* Wilkerson, 54 Miss. 677.
Wright *vs.* Frank, 61 Miss. 32.
Story's Eq. Pleading, Sections 398, 398 a, 399.

"became the owner of an undivided interest in said rolling "stock, in the proportion of its said payments to the total stipu- "lated price;" and, then, "that said company is either the owner "of said undivided interest, or upon a cancellation of an "option for the purchase thereof, is entitled to a lien on said "rolling stock for the amount paid thereon." Record, pp. 22-24.

The cross-petition alleges that the Railroad Company had never purchased nor contracted to purchase the rolling stock, and that the Oil Company was the Railroad Company's debtor for freight charges retained.

In view of such conflicting and contradictory statements the Court could grant no relief on the cross-bill.*

The Fourth Assignment of Error is well taken. The Court should have sustained the motion of appellant, to strike from the files the cross-petition of the receiver, for the reasons stated in said motion. Record, p. 90.

The bill filed by Katzenberger *et al. vs.* the Railway Company was a bill filed for the exclusive benefit of the complainants therein, and such other holders of bonds and coupons secured by the trust deed named, as might come in and be made parties.

Vide, 12th paragraph of bill. Record p. 6.

It was not a general creditor's bill.

The 5th prayer of the bill was only that a receiver be appointed to take possession of, and hold the railroad and mortgaged premises, for the use and benefit of the complainants, and other holders of bonds and coupons becoming parties subsequently.

*Barbour Chan. Practice, p. 130-1, Vol. 2, Bk. IV.
Hudson v. Hudson, 3 Randolph (Va.), 117-121.

The order appointing the receiver was based on the Katzenberger bill, and the specific prayer thereof, praying therefor. The receiver could not have, nor exercise, any powers beyond those that complainants in the proceeding that brought about his appointment, sought to have conferred on him, and these were to take, hold, operate, use and control the *mortgaged* railroad property and rights of all kinds, for the benefit of the complainants named. This embraced the power expressly conferred, to maintain and defend all suits necessary to acquire, reduce to possession and preserve all *mortgaged* railroad property and assets, for the benefit of the mortgagees.

Our contention in support of the motion, and on behalf of the fourth assignment of error, is two-fold. First: that the receiver, appointed at the suit of the bondholders, after the death of the trustee, and acting for their benefit, did not have conferred on him any power to sue for, nor to recover, property and assets *not covered by the terms of the trust deed;* and that earnings of a railroad company, though named in the trust deed, are not covered by it, and do not accrue for the benefit of the creditors secured thereby, while the railroad property remains in the possession of the mortgagor.*

Second: Although the power to sue for this class of railroad property or assets may have been sought to be conferred on the receiver by the order making the appointment, we contend that the effort was vain, and that the receiver did not acquire thereby, a legal right to sue, nor any authority to recover.

The pleadings and record show the character of the fund in controversy,—an amount claimed by a receiver, acting, it may be said, in the character of a trustee suing in behalf of

*Jones on Railroad Securities, §§ 114-220.
Freedman's Savings & Trust Co. *et al. vs.* Shepperd *et al.*, 127 U. S. 494.

bondholders, as income freight earnings accrued and due to the Railway Company, anterior to the receiver's appointment. Certainly the receiver cannot, any more than could the original trustee, proceed to recover such a fund.

As this Court has said, "the mortgage could have no re-"trospective effect as to previous income and earnings. The bill "of the trustees does not affect the rights of the parties. It "is an attempt to extend to mortgage to what it cannot be "made to reach. The fund stands as if it were any other "property, real, personal, or mixed, acquired by the mortgagee "*aliunde*, and never within the scope of the mortgage.*

The earnings of a railway company sufficient to provide for the operation of its road, and the surplus, belong to the company, subject to its sole control;† and those who receive any part of such earning before the appointment of a receiver, are not bound to account for them, to any mortgage bond holder, nor to any person suing for him, or in his behalf.‡

And especially cannot the receiver in the case at bar, maintain his cross suit for income and earning of this character, because while they belonged to, and were in the hands, and under the exclusive control, of the railway company, the authorized officers and agents of the railrway company had properly, and previous to the receiver's appointment, appropriated all sums derived from that certain source to the purchase of rolling stock, had executed due acquittances therefor, by crediting on the Railway Company's books, the amounts admitted by them to be due the Oil Company on account of

*American Bridge Co. *vs.* Max Heidelbach and Milton Courtright, Trustees, 4 Otto, 798.

† Gilman *vs.* Ill. & Miss. Telegraph Co. *et al.*, 1 Otto, 603.

‡ Railroad Company *vs.* Cowdrey, 11 Wall. 459.

rolling stock purchases, and charging against, and in part dischage of said admitted indebtedness, the amounts due for freight services; and the two companies had exchanged and accepted as correct, mutual statements of account, showing such due acquitance and discharge;* and the authority of the railway officials to do so, cannot now be questioned, nor revoked.

The argument throughout, thus far, has proceeded on an assumption of the utter invalidity of the contract made by the two companies on October 6th, 1883. Conceding, further, the option claimed by the receiver, that this contract conferred on the railway company on option only, to purchase the rolling stock mentioned, at its will, and further, was not obligatory on that company; and that the receiver, under the surrounding circumstances, was in suitable attitude, as late as the middle of February, 1887, then to exercise the same, and refuse to conclude the purchase; still the Court was without power to grant the relief sought in his cross-petition, and should have dismissed it.

As heretofore stated, the sums in controversy were paid to the Oil Company by the president and general managing officers of the Railway Company, before the appointment of the receiver, under the belief that, in law, the Railway Company was under valid contract to make such payments. Record, pp. 32–34, 38–45. Money paid under a mistake of law cannot be recovered.†

In the event the Court shall find that our position is well taken as to any one of the questions presented by the assignments of error already discussed, the result must be a determination of this appeal favorable to appellant.

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* Record, pages 33–34.

† Pollock on Contracts, 4th Eng. Ed., p. 409.
Bank of U. S. *vs.* Daniel, 12 Pet. 32.

If we are not sustained thus far, however, still we are confident that an examination of the merits of the claim presented originally, by Appellant must show that the Fifth Assignment of Error ought to be sustained. If it is demonstrated that there is equity in appellant's claim, and that it is entitled to relief on the original bill, it follows that no relief, whatever, could be granted on the receiver's cross-petition.

In a discussion of that question, it is necessary, in the first place, to understand fully the force and effect of the contract had between appellant and the Mobile & Northwestern Railway Company, in October, 1883, upon which, and the continued course of dealings under which, the appellant filed its original intervening petition herein.

The circumstances leading to its execution have already been presented.

The contract as written, is a fair embodiment of the agreement of the parties.* The initial recitals, that the Oil Company has *agreed*—with whom, and for whom?—to purchase certain named rolling stock, from certain locomotive works, and at certain prices, import an action undertaken on its part, at the instance, and for the benefit, of some one else. From the face of the contract, it is patent that this other person was the Railway Company, and that the purchase throughout was, in fact, made by the Railway Company *through* the Oil Company; and that, as its security for such advances, the Oil Company was to assume the attitude of *original vendor* and make a *conditional sale* of the property to the Railway Company—the title to the property to remain in the Oil Company, only, "*until the said Railway Company* shall acquire title to it * * * in the manner hereinafter set forth."

* Copy of Contract, Appendix pages 1 to 5.

The first clauses of the contract, therefore, state the amount of the advances that the Oil Company undertook to make in behalf of the Railway Company, and how they were to be made, and then relating to the security which the Oil Company shall have for the advances named, define what that security shall be, making it to embrace both a reservation of title to itself—conceded by appellee's counsel to be valid under Mississippi decisions*—and, also, an undertaking on the Railway Company's part, common to all contracts of this character, to keep the rolling stock in repair, to operate the same on its line of railroad, and to hold the same *subject* to delivery to the Oil Company, *upon its demand*, in case of failure or refusal on the part of the Railway Company to meet its obligations at maturity.

These stipulations provided, the contract then declares the *unequivocal agreement* of the *Railway Company to purchase the property at a day named*—without any express, or inferential, condition, option, or stipulation, whereby such matured liability was to be escaped or avoided, *save only* by the *prepayment* of the amount or balance due on account of the purchase named, to stop the running of the so-called *rent*. A third stipulation provides a definite mode for the liquidation of the indebtedness due for the stock—principal and interest—denominated rent, a withholding by the Oil Company of certain earnings of the Railway Company, to be credited, *first*, on the *rental*, and, next, the surplus "*to go as a credit upon the purchase money of said property.*" Interest on this surplus is allowed in exactly the same manner as is provided by the law merchant and Mississippi statutes, in all cases of partial payments on current indebtedness, and as a set-off against the interest stipulated to be paid in the way of rental. Record p. 26. Appendix, p. 6.

* Duke *vs.* Shackleford, 56 Miss. 552.

The manifest scheme, *which is, in all things, legitimate*, was, that the Oil Company should, and did, advance the money necessary to purchase the rolling stock for the Railway Company, and that the Railway Company should pay the Oil Company its advances, with eight per cent. interest, in installments, from freight earnings, as the services should be performed. The limitation of the contract, that is, the time the purchase money for the rolling stock should become due, was fixed at such a time as the parties estimated would be sufficient to enable the Railway Company to pay for the stock from such earnings; with this *option* only, in favor of the Railway Company, the right to purchase before the expiration of the limit fixed—which would operate to determine the payment of *rental;* in other words, put at an end the confessed relation of debtor and creditor, created thereby, and then and now subsisting between the two companies. And when, subsequently, it became manifest that the time so fixed had not been sufficient to enable the Railway Company to discharge its full indebtedness to the Oil Company, the limit was extended for an additional year, with the statement from the President of the Railway Company, that he would be able *to pay the whole balance off during that time*. Record, p. 39.

Disregarding its form, the contract, therefore, was, in effect, a manifest sale of the property to the Railway Company, under its *express agreement to purchase* at a given price, with the title reserved in the vendor until the purchase money should all be paid.* Payment of the interest due on the purchase money was provided for, as stated, by colorable payments of rent, and the surplus earnings remaining were to remain in the hands of the Oil Company—not "as a reserved fund belonging to the Railroad Company"—as counsel for appellee have contended,

* Harkness *vs.* Russell, 118 U. S. 663.

but were *to be applied* and *to "go as a credit upon the purchase money of said property."* Taking only the Railroad Company's accounts, and the testimony of its President alone, the contention of the receiver, as to any *option* on that company's part, is flatly contradicted and denied. Record, pp. 32–34.

The decisions upon contracts of this character are numerous in England and America. Many recent cases hold that where it is apparent that the contract, though nominally a *hiring*, is, in reality, a conditional sale, the courts will so regard it, looking to the substance rather than the form.* The intention of the parties, and the practical construction placed by them upon their contracts, prevail in every instance, over the mere language of the instrument.†

This being true, the contract stands before the Court, as stated, as, in effect, a *conditional sale*, with a right of rescission on the part of the *vendor*, in case the purchaser shall fail in payment of the purchase money. The vendor, however, has never sought rescission, but by its suit insists that the purchaser shall comply with and complete its obligation to purchase, by the continued making of paymemts which it is entirely able to make and to meet.

The receiver, however, in opposition to this view, contends that by the terms of this contract, an option was conferred upon the Railway Company to purchase, or not, according as it might

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* Benjamin on Sales, Corbin's 3d English and 4th American Editions of 1884, §§ 393 and 425–433, and cases cited.
Hervey *vs.* Locomotive Works, 93 U. S. 664.

† Donahoe *vs.* Kettrell, 1 Clifford, 141.
Irwin *vs.* United States, 16 Howard, 523.
United States *vs.* Gibbons, 109 U. S. 200.
Mobile, &c., Ry. Co. *vs.* Jurey, 111 U. S. 592.
Harkness *vs.* Russell, 118 U. S. 663.
Topliff *vs.* Topliff, 122 U. S. 122.
District of Columbia *vs.* Gallagher, 124 U. S. 505.

be in financial condition to do so, on the 1st day of January, 1886, extended to January 1st, 1887, or if it should elect to do so at such time.

And the receiver seeks to defeat the relief sought by appellant, and to found a claim for relief on his cross-bill, solely on the assertion of such option or privilege. We urge that there is no foundation for such a contention to be derived from the language or terms of the contract, or when the contract itself is fairly considered and construed in the light of the acknowledged purposes and known intention of the parties in making it, and their uniform course of dealings, acting under, and interpreting it by a practical construction of nearly three and a half years.

The receiver of the Railway Company has assumed, and continues, the uninterrupted possession, control and use of the rolling stock, by the express assent of the Oil Company, and by the direct order of the Court made at the time of his appointment, and by subsequent order, continuing in force the contract in question.° This fixes a charge for its payment on both the income and corpus of the railroad property.* In no event could it tender or surrender the property to appellant and thereby become entitled to recover back the payments it has made towards its purchase. Even if the Oil Company had proceeded to exercise the right reserved to the vendor in all such cases, to regain possession of the property, no action would lie against it by cross-petition, or otherwise, at the suit of the Railway Company, or its receiver, to recover what was paid on account of such purchase.†

The receiver, however, does not base his rights to recover on any such ground. His case rests solely on the assertion of

* Kneeland *vs.* American Loan Co., 136 U. S. 89.

† Corbin's Benjamin on Sales, just cited, §§ 425–433.

° Record, pp. 9 & 11.

an option in the Railway Company to purchase or not, as its financial condition might warrant, or as it should elect, as already stated.

There is a manifest distinction, well stated by the authorities, between a hiring or lease, with the *privilege* or *option* to the lessee to purchase, and possession, as in the present instance, under a contract of *conditional sale, or unconditional undertaking to purchase.*

The language of the contract is plain and unaccompanied by any limitation of the obligation, or liability assumed. "The said Railroad Company further *agrees that it will, on or* "*before the said 1st day of January, 1886, purchase all of said* "*property from said Oil Company, and pay for it in cash the* "*cost price thereof.*"

This clause immediately succeeds the clause from which counsel have evolved their conception of the option contended for, as though it were, thereby, purposely intended to exclude from the contract and wholly preclude any such doubt or hypothesis as that they assert.

This "*insolvency clause*" is not coupled with, nor embodied in, nor as any part of, the *immediate contract* of the Railway Company *to purchase.*

It is only a part of the precedent scheme, whereby title was to become vested in the Oil Company, delivery of possession made to the Railway Company, *under contract*, on its part, *to purchase*, and the engines and cars required to be properly cared for, as a continuing security to the Oil Company for the large advances then made by it on behalf of the Railway Company, so that, in the event it should become necessary for the Oil Company, in default of payment by the Railway Company, to resort to such security, the Railway Company would be in position to turn the same over to the Oil Company in good order and condition. It was a simple condition annexed to

the use of the property, to preserve it from destruction and waste, for the joint benefit of both companies, incorporated in contracts of this character, and which has never been held to affect the title to the property in question, nor the contract rights and obligations of either party, with regard either to title or liability. The attitude of the parties before, and at the making of the contract, and their long course of dealings under it, show that such was the purpose, and the only purpose, intended to be answered by the clause referred to.

And when an extension was granted, the agreement was "that the time for the *purchase by the Mobile & Northwestern "Railroad Company of said engines and cars*" was extended, and *not* that the *privilege* or *option* to purchase was, in any manner, *granted*, *conferred*, or *extended* to it.

We insist that if any option at all existed up to January 1st, 1886, that such option was definitely determined at the time of, and by, the making of this last named agreement, and that the Railway Company then elected to purchase the property named, and stood bound thereby, to complete such purchase by January 1st, 1887, at the latest.

Aside from these considerations, mere inability to pay, as counsel insist, does not operate as a release from unconditional contract obligations. A man may, by positive contract, undertake to do what he will, and unless he shield himself by proper conditions, he will be held to his undertakings; and in all contracts, such conditions as are made impossible by the default of the party, or otherwise than by the act of God, are treated as direct promises. What could or should be done, will be enforced. Mere insolvency is no answer to process for debt.*

* Pollock on Contracts, 4th Eng. Ed., marginal pp. 380–388.

By the way of additional reasons that may be urged against the contention of any option, dependent on the solvency or will of the Railway Company, or any receiver, is the fact that at the time the contract was made, the parties to it knew that it was beyond the range of human possibility for the Railway Company to have on hand, or to accumulate, by January 1st, 1886, or later, any sufficient fund, in cash, to pay for the rolling stock mentioned. The Company was hopelessly insolvent. It had no rolling stock whatever, hence no earning capacity. It was n debt $250,00 on first mortgage bonds, with the interest on them, in arrears for from seven to eight and a half years; and the Katzenberger bill states the fact that it had paid no interest on any of its said indebtedness for several years past, and then owed, principal and interest threeon, about $400,000. Record, p. 5.

It was further indebted in large sums on unsatisfied judgments in the State Courts, rendered on debts incurred in the operation of the road. Record, p. 6.

That the Oil Company, under such circumstances, entered into a contract, requiring it to make large expenditures in the purchase of property for which it had no use, and which its charter gave it no right to own, subject, daily, to destruction, and to certain great deterioration in value, and depending for reinbursement on the contingency of some sudden Aladdin-wrought solvency of the Railway Company, or that the Railway Company sought to effect any such contract or agreement, it is impossible to conceive. To have done this, would have been for the Oil Company to contract, in advance, for the non-performance of the contract on the Railway Company's part. At the very time the contract was made, and from that date, continously, to December 15th, 1886, a receiver could have been applied for and appointed on any day it had pleased any

part of the bond, or judgment, holding creditors so to proceed; and, then, if the receiver's contention be true, there was never a day that the Oil Company could have hoped to see the purchase by the Railway Company consummated.

As opposed to this, how much more in consonance with sound legal judgment is the Oil Company's position, concurred in by the Railway Company itself, that this is a contract obligation of the Railway Company to repay timely advances made by the Oil Company to the Railway Company, for acquiring necessary rolling stock; and, as security, that the title to the rolling stock remain in the Oil Company, until the cost prices of the same, had been repaid from a fixed part of the income of the insolvent corporation; thereby, securing to the Oil Company reinbursement with certainty, under the terms of a contract which it was known, in advance, would be respected, and enforced, by a Court of Equity.

Even if it be conceded that there was an option in the company dependent on its ability to purchase, the receiver did not exercise it on the day fixed. He failed to notify appellant of his election until long after January 1st, 1887, and *has never yet* turned the rolling stock over to appellant "in good order" or *otherwise, nor offered to do so.**

Again, if it existed, the receiver must be held estopped to set up any such option, or right to elect under it, because his ability to purchase, and the necessity for him to do so in order to operate the road, are averred, and proved by appellant; and any supposed inability of the company to purchase, is waived by appellant in its answer to the cross-petition, and ample opportunity offered the receiver to complete the purchase the contract calls for. Record, p. 28.

* Texas & Pacific Railway Company *vs.* Marlow, 123 U. S. 687.

Proceeding, now, upon the hypothesis that the contract cannot be construed as an option, without force as against the Railway Company, but is, instead, an obligation enforcible on the demand of the Oil Company, we submit that the means adopted by the parties to effect the discharge of such obligation, is exactly in the line of what the law itself would have provided if no contract had been made.

The proof shows, conclusively, that at the time the Railway Company purchased, or contracted to purchase, the rolling stock in question from the Oil Company, and secured possession of the same in the manner stated, it was absolutely without the means to operate its road. Its business was on the verge of total suspension. The security of the bondholders would thereby have been, either destroyed *in toto*, or very seriously and materially lessened and impaired. This obligation to the Oil Company for necessary rolling stock was incurred, therefore, in conducting the business of the road, and in preserving its property from serious loss; and, as such, both at law, and in equity, its discharge became a permanent paramount lien on the earnings of the road, as against all general contract creditors, and against the bondholders themselves. Under such circumstances, the Railway Company had ample authority to pledge its earnings, and to execute a contract, hypothecating a particular portion of them for the discharge of appellant's claim.* The pledge was intended to cover only enough to meet the actual cash cost price of the rolling stock.

When the receiver was appointed he took the road, its property, including, under the express order of the Court, this rolling stock, and its income, subject to that pledge, and he was

* Laws of Mississippi, Appendix p. 6.
Jones on Railway Securities, §§ 114–120.
Teal *vs.* Walker, 111 U. S. 242.
Sage vs. Memphis & Little Rock Railway Co., 125 U. S. 361.
Freedman's Savings Co. *vs.* Shepherd, 127 U. S. 501.

bound to respect it. The railroad property and assets were subject to the same equities in his hands, as subsisted against them prior to ,and at the time of, his appointment. Payment would have been made to the Oil Company in full, if the road had continued in the hands of its officials. The earnings pledged to it would have been applied to that purpose; and the Oil Company has the right as against the receiver, to have the same earnings made by the road from the same source, applied in the same manner. If the receiver should refuse, as he did, to permit such application to be made, a court of equity has the right to direct the contract to be continued in force until the balance of the obligation to the Oil Company should be discharged. If, at the termination of the receivership, a balance should still remain due the Oil Company, the court has authority and should then direct the payment of such balance from the general earnings of the road.* And if there should still remain a balance due the Oil Company on its sale of said rolling stock, the equities of appellant as against the bondholders are so cogent and superior, that the court should charge such balance against the corpus of the property after sale, and decree its prior satisfaction.†

The Court below, however, refused to grant appellant any manner of special or general relief, such as it was entitled to, on the facts developed; dismissed its petition and rendered judgments in the receiver's favor, for specific amounts from which these appeals, numbered 122 and 123, are taken.

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* High on Receivers, § 394, a–h.

† Fosdick *vs.* Schall, 99 U. S. 235.
Hale *vs.* Frost, 99 U. S. 389.
Miltenberger *vs.* Logansport Railway Co., 109 U. S. 286.
Burnham *vs.* Bowen, 111 U. S. 776.
Union Trust Co. *vs.* Illinois Midland Railway Co., 117 U. S. 434.
Union Trust Co. *vs.* Morrison, 125 U. S. 591.
Kneeland *vs.* American Loan Co., 136 U. S. 89.

The Court in entering such decrees, arrived at its judgment by construing the contract as a lease, entirely unenforcible because it created and conferred an option only, as contended by the receiver, and imposed no obligation, otherwise, on the Railway Company.

This feature we have already discussed.

Counsel urged, also, in argument, in support of the motions made by them, at the October Term, 1888, of this Court, to dismiss, or affirm, these cases, and against the enforcing of the contract, that it is illegal and void, because of certain stipulations charged to be in contravention of public policy.

The specific agreement not to haul seed in bulk for any other corporation or person, is certainly void.

That to give all needed facilities and preference to the Oil Company is not. It must be held to mean only facilities and preferences authorized by law; under the rule that all inferences and presumptions, where possible, must be indulged in favor of and to support the legality of the several stipulations of a contract.*

Conceding, however, they are both illegal, the contract will stand notwithstanding, with their expurgation.

They are separable and independent of all other stipulations.

The rule cannot be controverted that where there are several separable promises, and the *consideration is tainted with no illegality*, though some of the promises are illegal, those that are legal will be enforced.

* Chicago & Alton Ry. Co. *vs.* Wiggins Ferry Co., 119 U. S. 616.

To avoid the unquestioned force of this proposition, the efforts of counsel are directed to demonstrate the "interdependent character" of the contract, that they may deduce thence, its entire illegality. Their position and arguments, however, are based on, and proceed from an erroneous statement of the language of the contract. We submit that on the former arguments presented by Counsel, on the motions made in 1888, on page 18 of their first brief, they *misquote*, and then found their conclusions on nothing save such erroneous quotations. A legitimate, *eo instante*, is transformed into an ultra unlawful provision. This is sought to be effected by connecting the agreement of the Railway Company "to use and operate said property upon the line of its railroad, and to turn "the same over, should it at any time violate its *agreement*, "(in the singular number), upon the demand of said Oil Company," with the void clause referred to, regarding the hauling of seed in bulk. Clearly this first clause has no connection whatever, with the subsequent one. It refers to, and embodies, only one, distinct agreement, to operate the rolling stock on the line of its own road, subject to the right of the Oil Company to demand a surrender of the property, if that be violated. It was with this understanding, and for this purpose, that the property was bought and sold by the Oil Company, and it was proper that the contract should express as much.

A contract must be presumed legal, and that presumption, aside from any other consideration, limits the application and effect of the agreement named, in the manner we have suggested. And further than this, the force of the clause cannot be extended by any manner of artificial construction.

This much, to state the facts as they are, and to avoid the danger of any misapprehension of the true terms of the instrument, we may proceed to apply the rule invoked to the point at issue.

In the first place, the *entire consideration moving from the Oil Company is pure, unquestioned* and *untainted*, the purchase and sale to the Railway Company, of rolling stock, at the factory prices; and there is, then, on the other hand, the separable undertakings, on that Company's part, to use and operate the same on the line of its road, and to consummate its purchase thereof within a certain time. These undertakings performed by the Railway Company, and its title becomes absolute. Certainly no such disassociated stipulations as those referred to, can be held to avoid the contract in all its parts.*

Neither the antecedent, continuiug use of the property, nor the subsequent acquisition of the title to it, is made in any way dependent on the precedent performance of the void stipulation referred to. This determines the void clause to be independent of the remaining and other antecedent clauses of the contract.† The stipulation was, *ab initio*, an inoperative undertaking on the part of the Railway Company, injected into the contract, it is fairly reasonable to conclude from the subsequent conduct of the parties, by the Railway Company itself, to induce the advances to it for the purchase of rolling stock, and only the Oil Company could complain if it was thereby led into making a contract unenforcible in part. The Railway Company cannot complain that it undertook to do a vain thing. Its undertaking was mere *brutem fulmen*. It harmed no one, invalidated nothing.

The fact that this clause is so separable in law, and that other parts of the contract are not dependent on it, is demonstrated most clearly by the subsequent conduct of the parties.

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* Erie Ry. Co. *vs.* Union Locomotive & Exp. Co., 35 N. J. Law, 240. Greenhood on Public Policy, Rules XXII–XXIII, p. 20, et seq. Pollock on Contracts, Marginal pp. 320–1.

† Hare on Contracts, pp. 587–589.

There has never been any enforcing of, nor desire on the part of the Oil Company, to enforce the particular objectionable stipulations of the contract above referred to. Much more than this, the Oil Company has never sought performance of those other certain parts of the contract, which, while not subject to the criticism of illegality, have been denominated as harsh and oppressive—the requirements that the Railway Company should build seed houses, and have its agents buy seed, and perform other like services for it.

The Oil Company avers that it has always disavowed any desire to seek performance or enforcement of any such privileges, exclusive or otherwise. It sought no such relief in its petition, and makes proof of the fact that the cost of all seed houses, and the salaries of all agents, were paid for by itself, *exclusively with its own funds.* Record, pp. 26–7.

The contract was, therefore, purged of any illegality by the conduct of the Oil Company under it, in refusing to accept any illegal benefits, and by reason of its failure to seek relief as to any of such matters in this proceeding. Appellant does not require the aid of any illegal or questionable stipulation to establish its title to the character of the relief prayed for by it in the original proceeding, and it is entitled to a decree, therefore, notwithstanding they may exist.*

As already suggested, the objectionable features were manifestly engrafted on the contract without the procurement of the Oil Company. It is entirely competent for parties, by subsequent acts, or agreements, to modify or annul the terms of a written contract in any desired particular.†

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* Wilkinson & Co. *vs.* Reily, 47 Miss. 313.

† Teal *vs.* Bilby, 123 U. S. 578.

We suggest, further, as to this feature of the case, that, if in any particular, there may be a doubt as to the legality of any of the provisions of the contract, and a further doubt as to whether any confessed illegal provision should be extended to destroy the validity of the entire contract, the rule requires that the contract should be construed throughout so as to uphold its legality, and give it binding force in all particulars possible.* [3]

We cannot but contend with confidence, in view of the circumstances attending the execution of the contract; the mutual understanding of both parties to it, of the intent and effect of the same, and of the end sought to be accomplished by its execution, coupled with a long, practical construction of its operative provisions, in harmony with the avowed purposes of the parties; the great benefit accruing to the Railway Company and its protected and unprotected creditors, from the advances made by appellant; the saving and preserving of its property from wreck, and the strong equities in appellant's favor arising therefrom, and hence pervading the entire transaction; that the Court should have given effect to the great valid body of the contract, under which relief was sought, by suitable decree, as prayed by appellant.

Its failure to do so was error, and should result in the reversal of this cause.

If the Court should adjudge against us, on the arguments advanced in support of the Fifth Assignment of Error, we submit that it can do so only by viewing the mooted contract as void throughout.

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3 Hobbs *vs.* McLean, 117 U. S. 567–575.
United States *vs.* Central Pacific Ry., 118 U. S. 235.

If this be true, then we are led to a consideration of the Sixth Assignment of Error presented to the Court: That the Court erred in entering a money decree against appellant, in favor of appellee, for $10,550.41.

If the contract be void, the most that can be said is that the parties to it are *in pari delicto*, and, therefore, they occupy this position before a Court of Equity:—

The money sued for by the receiver came into the hands of the Oil Company under the express terms of the contract in evidence, and that contract being illegal and void, and the decree rendered against it being on a cross-petition, such decree was erroneous as disregarding the maxim: *in pari delicto, potior conditio est defendentis.*

It is contended, however, in answer to this proposition, that, while the parties are *in delicto*, they are not *in pari delicto*, because the Railway Company was in necessitous circumstances at the time the contract was made. This latter rule may be classed as an exception grafted on the general rule just cited.

To take a case out of the general rule, and bring it within the exception, the complainant must *allege* and *prove* fraud, or exceptional circumstances tantamount to fraud, whereby the adverse party has contrived to secure, and has secured, undue and unconscionable advantage of the complainant.*

The whole record shows that there was never any such effort made by the Oil Company, nor any effort to do aught than to aid the Railway Company as much as, and in every way, it could, and that, at a time when the holders of its first mortgage bonds failed to enter an appearance for its relief. No undue advantage has been shown ever to have been taken

* O'Connor *vs.* Ward, 60 Miss., 1025.

of the Railway Company, and no exercise of undue influence can be presumed. Fraud, in all its forms, must be proved. The parties, therefore, must be considered to stand *in pari delicto*, and the Court was powerless to grant any relief, one way or another, either to require the Railway Company to return the rolling stock, or to decree that the Oil Company refund the money derived from and due for its use and employment.*

But if not *in pari delicto*, then the Oil Company has paid the outstanding valid commercial obligations of the Railway Company, for operating expenses, and made advances to it, to the amount of $9,230.61. Such payments can be made out and shown without recourse to the contract.† These obligations were taken up and sums paid out by the Oil Company, at the instance, and on account of the Railway Company, and are shown by exhibits to the deposition of its secretary and treasurer.

Vide Record, pp. 41 to 82.§

* Block *vs.* McMurry, 56 Miss., 217.

† Wooten *vs.* Miller, 7 S. &M. (Miss.), 380.
Holt *vs.* Bartow, 42 Miss.,711.
Gilliam *vs.* Brown, 43 Miss., 641.

§ For convenience of reference an itemized statement of these payments is taken from the record, as follows :

"EXHIBIT A," 1. Page 80.

Feb'y 6, 1884.	Cash	$	77.37
" 7, "	"		50.00
" 20, "	60 Cedar posts		30.00
May 20, "	Cash		313 27
Oct. 20, "	" on Engine note		2600 00
Feb'y 17, 1885.	" Bal. on Engine Note		5352 59

DEPN. T. T. A. LYON. Page 33.

March 20, 1884.	Cash		200.00

ON COMMISSIONER'S STATEMENT.
(Not entered above). Page 89.

Nov. 1, 1884.	Payment		80.38
" " "	"		250.00
July 1, 1885.	Payment		125.00
Aug. 1, "	"		125 00
Nov. 30, 1886.	Cash paid G. O. Quarles, Supt		20.00
	Total		$9230.61

These sums are a valid set-off against any and all claims held against it by the Railway Company, or its receiver, no matter from what source arising; and at the same rate of interest the Court directed the commissioner to charge against the Oil Company, amounted to and represented an independent, aggregate indebtedness to the Oil Company, at the date of the decree below, largely in excess of the amount of the decree against it in the receiver's favor. Against this indebtedness, shown by the books of account of both companies, aside from and independent of any contract, the Oil Company had applied the indebtedness due by it for freight services. And such application had been *expressly and subsequently approved and confirmed* by the manager of the Railway Company.

A receiver's rights are no higher, in any regard, than those of the owner in possession. Legal and equitable claims and counter claims are enforcible against him in the same manner. When he enters upon the discharge of his duties, and in the discharge of them, he is subject to be encountered by the like demands and equities that could be interposed if the same demands were prosecuted by the Company itself. The Court should have recognized this fact, and permitted the settlement of the parties to stand.

In further opposition to the right of the Court to grant the decree complained of, and in support of this Assignment of Error, we urge again, upon the Court's attention, the arguments and authorities heretofore presented in support of the First, Second and Third Assignments. We think they can be brought to the Court's notice a second time, very properly, and with force, and as fatal to the judgment of the Court below.

If the result of the Court's examination of the preceding Assignments of Error shall be unfavorable to appellant, it would seem that we can rely for a reversal of the decree on those Assignments remaining for final presentation.

To our minds. the only conceivable ground on which the Court could sustain a recovery by the receiver, is to adjudge the whole contract to be void, and that the claim for the money sued for, had been made out without recourse to the illegal contract.

The receiver, on hearing, made no such proof nor claim.

But if this were true, then the contract being held for naught, it was error in the Court to make a decree of reference, requiring the Commissioner to charge eight per cent. per annum interest against the Oil Company. Record, p. 83.

The legal rate by law, in Mississippi, on such recoveries, is six per centum. Appendix, p. 6.

The result is, that the decree is largely in excess of all the legal demands of the receiver, presuming such demands already to have been made out, and sustained by the Court.

This error on the part of the Court must result in sustaining the Seventh, Eighth and Ninth Assignments of Error, and a remanding of the cause for the stating of a proper account.

In conclusion, we invite a careful examination of the entire record in this cause, in the belief that the Court will find such inherent infirmities in the judgments and decrees of the Court below, as will suffice for a reversal thereof.

Respectfully,

J. W. Lentz.

APPENDIX.

COPY OF CONTRACT TAKEN FROM THE RECORD.

This contract, made and entered into on the 6th day of October, 1883, by and between the Sunflower Oil Company of Clarksdale, in the State of Mississippi, and the Mobile & Northwestern Railroad Company, both corporations under and by virtue of the laws of the State of Mississippi, witnesseth:

That the said Sunflower Oil Company has this day agreed to purchase of the Baldwin Locomotive Works, in Philadelphia, Penn., two locomotive engines and tenders complete, named, respectively, Le Flore and Yazoo, at the price of seventy-six hundred dollars each, making together the sum of fifteen thousand two hundred dollars, and to invest the further sum of two thousand four hundred dollars in box and flat railroad cars; all of which property the said oil company agree to lease unto the said railroad for the full period of time up to January 1st, 1886, at and for the sum of fourteen hundred and eight dollars per annum, said rental to be due and payable on the last day of each and every month, while this contract continues, in monthly installments.

Said locomotive engines and cars are to be bought and paid for in the following manner, to wit: The engine Le Flore and said cars are to be paid for by said oil company in cash, and are at once to be and continue its property until purchased by said railroad company in the manner hereinafter provided, and said locomotive engine Yazoo is to be purchased of said Baldwin Locomotive Works upon the obligation of said railroad company, guaranteed by the mercantile firm of J. T. Fargason & Co., of Memphis, Tenn., which guaranty the said oil company has agreed to procure for said purpose; which obligation is to be paid to said Baldwin Locomotive Works six months from this date, together with six per cent. interest, and until the payment of said obligation the title to said locomotive Yazoo is to be and remain in said Baldwin Locomotive Works. Should said railroad company pay said obligation at maturity the title

to said engine is to be in it, but should the said J. T. Fargason & Co. have to take up said obligation on account of their said guaranty, then the title to said locomotive Yazoo shall be and remain in said Sunflower Oil Company until said railroad company shall acquire title to it and the other said property in the manner hereinafter set forth.

Should said railroad company promptly meet said obligation to said Baldwin Locomotive Works for said engine Yazoo, then thereafter the rental of the property above named belonging to said oil company shall be eight hundred dollars per annum, payable in monthly installments at the end of each calendar month which this contract has to run.

The said railroad company further agrees and binds itself to take all proper care of said locomotive engines, tenders, and cars, and turn the same over to said oil company in good order and condition at the end of this contract, should said railroad company be then unable to purchase the same, at the price hereinafter mentioned; and said railroad company further agrees to use and operate said property upon the line of its railroad and to turn the same over, should it at any time violate its agreement, upon the demand of said oil company.

The said railroad company further agrees that it will, on or before said 1st day of January, 1886, purchase all of said property from said Oil Company and pay for it in cash the cost price thereof, but said railroad company shall have the right at any time before said 1st of January, 1886, to purchase the whole of said property by paying the cash price thereof to said Oil Company, and in the event it does so the contract of rental hereinbefore set out shall immediately cease and determine, but such purchase shall not have the effect of anywise impairing this contract so far as its other terms are concerned.

And said railroad company further agrees that it will within sixty days from this date erect houses at four, or more if necessary, of the depots on its said road for the purpose of receiving cotten seed in bulk for said oil company, and that it will have scales for weighing seed by the wagon-load, and that it will haul seed in bulk from the various points along the line of said railroad to Clarksdale, Miss., for said Oil Company. It

is further agreed that the agents of said railroad company along the line of its road will weigh cotton seed, purchase same, if desired, all free of cost for any service to said Oil Company. The said railroad company agrees that it will haul all sacks for said Oil Company free of charge, and that it will receive and haul all freights for said Oil Company at the Mississippi river opposite Helena, Ark., free of storage or commission. It is understood that the freight to be paid by said Oil Company to the said railroad company for hauling cotton seed in bulk or in sacks, or for any product of the mill or for supplies for said mill, shall be at reasonable rates, to be fixed at various times by the Presidents of said two companies, but the freight on seed in bulk is not to exceed $1.75 per ton, and freight on seed in sacks is not to exceed $2.00 per ton.

It is further agreed that said railroad company will not haul cotton seed in bulk for any other corporation or person, nor permit its agents to purchase or pay for cotton seed for any other corporation or person. The said railroad company further agrees to put in a switch or side track at Clarksdale, so as to reach the mill of said Oil Company, so as to load and unload freight at said mill.

It is further agreed that said railroad company will give all needed facilities and preference to the said Oil Company to enable it to control all cotton seed along the line of said railroad as it now is or as it may be while this contract is in force. All freight earned by said railroad company for hauling seed, supplies, or products of any kind for said oil company is to be credited on amount of the rental of said property, and should there remain a surplus after paying rent it is to remain in the hands of said Oil Company and go as a credit upon the purchase-money of said property. Interest is to be allowed said railroad company on such surplus at the rate of eight per cent. per annum. Said railroad company is to furnish said oil company a statement of freight due it at the end of each month while this contract continues, and the same is to be credited in the manner above stated.

This contract is to continue in force until the 1st day of January, 1886.

Witness the signatures of said companies, by their respective Presidents, this day and year first above written.

THOS. T. A. LYON,
President of the Mobile & Northwestern R. R. Co.

J. T. FARGASON.
President Sunflower Oil Co.

We, the undersigned, President and Secretary *pro tem.* of the Mobile & Northwestern Railroad Company, certify that on the 8th day of October, 1883, at a meeting of the directors of said company, held at their office in Memphis, Tenn., the following resolution was passed :

Resolved, That the contract made between Thos. T. A. Lyon, President of the Mobile & Northwestern Railroad Company, and Jno. T. Fargason, President of the Sunflower Oil Company, at Clarksdale, Miss., under date of October 6th, 1883, regarding the purchase of locomotive and cars, and hauling seed, &c., is approved and ratified.

THOS. T. A. LYON,
President.

JNO. R. FLIPPIN,
Secretary pro tem.

It is hereby agreed between the Sunflower Oil Company and the Mobile & Northwestern Railroad Company that the time for the purchase, by said Mobile & Northwestern Railroad Company, of the engines and cars of said Sunflower Oil Company mentioned in the foregoing contract be extended for one year from the first day of January, 1886, and that said contract and all the provisions thereof, with the change made in the time for the purchase of said engines and cars as aforesaid, shall be extended and continue in force until the 1st day of January, 1887.

MOBILE & NORTHWESTERN RAILROAD CO.,
By THOS. T. A. LYON,
President.

THE SUNFLOWER OIL COMPANY.
By J. T. FARGASON,
President.

STATE OF TENNESSEE, City of Memphis:

Before me, the undersigned, commissioner duly appointed and commissioned by the Governor of the State of Mississippi to reside in the State of Tennessee, and qualified to take acknowledgments of instruments of writing to be recorded in said State of Mississippi, this day personally appeared Thos. T. A. Lyon, President of the Mobile & Northwestern Railroad Company, and acknowledged that said railroad company and he, as President thereof, executed the foregoing two instruments of writing on the days and years therein mentioned.

Witnesss my hand and official seal this 22d day of September, 1886.

[L. S.] HUDSON CARY,

Commissioner for Mississippi, at Memphis, Tenn.

STATE OF TENNESSEE, City of Memphis:

Before me, the undersigned, commissioner duly appointed and commissioned by the Governor of the State of Mississippi to reside in the State of Tennessee, and duly qualified to take acknowledgments of instruments of writing to be recorded in said State of Mississippi, this day personally appeared J. T. Fargason, President of the Sunflower Oil Company, and acknowledged that said oil company and he, as President thereof, executed the foregoing two instruments of writing on the days and years therein mentioned.

Witness my hand and official seal this 22d day of September, 1886.

HUDSON CARY,

Commissioner for Mississippi, of Memphis, Tenn.

Filed for record, September 23d, 1886, at 2. P. M.

R. N. HARRIS,

Clerk.

By J. ALLEN, *D. C.*

SECTION 1033, OF CHAP. 38, OF THE REVISED CODE OF MISSISSIPPI, 1880.

"Mortgages or deeds of trust subordinate to certain claims."

Section 1033. No mortgage or deed of trust conveying the income on future earnings of any corporation, or the rolling stock of any railroad company, shall be valid against debts contracted in carrying on the business of the corporation, nor against liabilities incurred by railroad companies as carriers of freight and passengers, or for damages sustained by persons or property; but such mortgage or deed of trust shall be valid as against any claim in excess of five thousand dollars for damages to any person.

AN ACT IN RELATION TO THE LEGAL AND CONVENTIONAL RATE OF INTEREST; REVISED CODE OF MISSISSIPPI, 1880.

Section 1141. The legal rate of interest on all bonds, notes, accounts, judgments and contracts shall be six per cent. per annum, but contracts may be made in writing for the payment of a rate of interest as great as ten per cent. per annum. * * *

Section 1144. When partial payments are made on bonds, contracts or assurances that bear interest, the interest that has accrued up to the time of such payment, shall be first credited, and the residue of such partial payment shall be placed to the payment of the principal; and the same rule shall apply to all debts due by the judgment, sentence or decree of any Court.

Office Supreme Court U. S.
FILED,
DEC 8 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

No. 123.

SUNFLOWER OIL COMPANY, *Appellant,*

versus

BENJAMIN WILSON, *Receiver Mobile & Northwestern Railway Company, Appellee.*

Abstract, Assignments of Error, Brief and Argument on behalf of Appellant.

JNO. W. & WM. D. CUTRER,
of Counsel for Appellant.

IN THE

Supreme Court of United States,

OCTOBER TERM, 1891.

No. 123.

SUNFLOWER OIL COMPANY, *Appellant,*

versus

BENJAMIN WILSON, *Receiver Mobile & Western Railway Company, Appellee.*

Statement, Assignments of Error, Brief and Argument on behalf of Appellant.

STATEMENT.

The Mobile & Northwestern Railway Company, in 1877, executed a trust deed, termed in the pleadings, a mortgage, on all its property, to secure an aggregate bonded indebtedness of $250.000. It failed, from the beginning, in payment of interest on the same, and on November 15th, 1886, Moses H. Katzenberger and others, holding a large majority of the bonds aforesaid, and of the past due coupons attached, filed a bill against the defaulting company and other necessary parties, in the District Court of the United States for the Northern

District of Mississippi, to enforce sale of the property and franchises covered by the trust deed, for the payment of the indebtedness aforesaid; and praying for the immediate appointment of a receiver to take control of the mortgaged premises. Record p. 1. Subsequently, the bill was amended, and on December 15th, 1886, Benjamin Wilson, the defendant and appellee in this case, was appointed receiver of the Company. Record p. 9. At the time the original Katzenberger bill was filed, the Railway Company had been in default in its interest payments for periods varying from four and a half to eight and a half years. Record p. 5. Notwithstanding such prolonged and continuous default, the bondholders suffered the entire property to remain in the hands, and under the uninterrupted control and management of the Company, its officers and agents, until the date last stated. During the continuance of this state of affairs, in January, 1883, the President of the Railway Company, Thos. T. A. Lyon, contracted with the Baldwin Locomotive Works, for two locomotives, at a cost of $7600 each, to be completed in the fall of that year. Just preceeding their completion, the only locomotive the Railway Company then had, became permanently disabled; and though the new locomotives ordered were then within a few days of completion, the Company had no money, nor means of securing money, to pay for them. In this strait, and when the bondholders themselves would extend no assistance, on application to the appellant, that Company intervened with the means necessary to avert a total suspension of the Railway Company's business, and a total wreck of the interests of the bondholders. It advanced the means requisite to the purchase of the locomotives and other needed rolling stock that the Railway Company had already contracted to purchase, and, as security for the advances so made, took the title to the property to itself, while the Railway Company, on

its part, agreed to repay such advances, within a stated time, with eight per cent. interest, and undertook to guarantee such repayment by obligating itself that all charges for freights hauled for the Oil Company, should be by it retained, and applied to and for that purpose. When such repayment should thus be effected, the title was then to vest in the Railway Company. Record pp. 32–34, 38–39 and 40-45.

This agreement was intended to be embodied in an agreement and contract reduced to writing between the parties, and filed as Exhibit A, to the original petition or bill filed by appellant against the Receiver of the Railway Company. Record p. 16. See, also, Appendix hereto, p. 1–5. The annual rental reserved therein, $1408, it will be noted, represents the exact annual interest due, at eight per cent., on the $17 600 advanced by the Oil Company for account of the Railway Company. Acting upon this understanding and agreement, the two Companies conducted all their mutual dealings. The Railway Company *credited* the *Oil Company*, on *its books of account, with the sums so expended on its behalf, in the purchase of the rolling stock in question, with eight per cent. interest*, at stated intervals, as the same accrued, and charged up against it, on the same accounts, the amounts due for its services to the Oil Company; and, inverting the order, the *same debit and credit items were entered upon the books of the Oil Company*; the stated balances, from time to time, so appearing due the Oil Company, representing the dues to it, by the Railway Company on the purchase of its operating rolling stock. The last of such statements was made out by the President of the road against the Oil Company about the time of the appointment of the receiver herein, and *showed a balance due the Oil Company on the purchase of the rolling stock of $7,023.26.* Record pp. 33–34.

When the day for the repayment in full of the aforementioned advance made by the Oil Company arrived, the Railway Company still owed a balance of several thousand dollars, which it was not able to pay at that time; and at its instance it was "agreed * * * that the time for the purchase "by the Mobile & Northwestern Railroad Company, of "the Engines and Cars" mentioned, should be extended for one year from the original date of maturity, *i. e.*, January 1st. 1886. Record p. 18. Appendix p. 4—.

When the appellee was appointed receiver, the Court directed that the existing contract for the purchase or use of rolling stock be continued in force. Record p. 11.

This order was made without the knowledge or solicitation of appellant, but related to the rolling stock in controversy, inasmuch as the record shows that the Railway Company from the time of its rolling stock purchase through the instrumentality of appellant, to final decree in this cause, had absolutely no other, either in use or under contract. Proceeding under this order and authority, the course of dealings between the receiver and appellant continued as it had between the two companies, before his appointment, until after the 1st day of January, 1887. In February following, for the first time, the appellant was advised of a contention by the receiver that the Railway Company had not obligated itself to pay for the rolling stock it had contracted in the early part of the year 1883, to purchase from the manufacturers, and which purchases it had effected, as stated, through the aid of appellant, but that as to it, the Railway Company, the whole transaction was by him considered a mere privilege to purchase, dependent both on the inclination of the Railway Company, and its own estimate of its ability to

consummate such purchase, and that he would not be bound by it. Thereupon, under the aforementioned original agreement and contract the Oil Company, on February 14th, 1887, exhibited its petition or bill against the receiver, and asked the Court to enforce the dues and rights secured and accruing to it under an equitable and just interpretation of the terms of the aforementioned original agreement, and the subsequent contract of the parties, requiring the purchase of rolling stock to be made by the Railway Company on January 1st, 1887.

There was then due appellant on this purchase, a balance of $6.732.15, which sum was a prior equitable charge on the entire earnings of the road during receivership, much the more so on the earnings expressly reserved and pledged to discharge that indebtedness, as accruing from the Oil Company's business, and which earnings only the bill sought particularly to require should be declared a specific trust fund, applicable first to the discharge of the Oil Company's said claim. And to satisfy which, the Court, should under appellant's prayer for general relief, have extended a prior lien to the corpus of the entire property, if necessity should thereafter, so demand. Record pp. 12–15. The receiver answered, averring, first, that by its *admitted payments* to the Oil Company, the Railway Company had become the *owner* of about a *two-thirds interest* in the said engines and cars, or of *an undivided interest therein in the ratio of its said payments to the total price it had contracted to pay for the same;* and then suggested, in conclusion, that an option had been conferred upon the Railway Company which it had never exercised, whereby it had become entitled to recover from the Oil Company the total amount *previously* and *mutually applied* by the two companies toward *the settlement of their rolling stock account.* Record, pp. 22-24.

To this cross-petition, appellant filed an answer, setting forth, with particularity, the nature of the contract between said companies, and their mutual dealings under it. It denied any right, title or authority of the receiver to recover from it any sum or amount whatever, for freights hauled, especially for the reason that prior to the time of the appointment of the receiver, the two companies had had a full settlement of all matters of account, including the items for freight services named, "which said settlement, accounting, application of "payments, and discharge of mutual charges, and indebted-"ness, respondent is advised, is final and conclusive between "the parties thereto, and the said receiver cannot now be heard "to object to the same;" and for the further reason that the indebtedness due said Oil Company arose from an obligation incurred in, and necessary to, the carrying on of the Railway Company's business; which earning, as accrued, and accruing, it insisted it still had the right to retain and apply in the same manner. Record pp. 27–28.

Upon the pleadings so made up, appellant took the depositions of the presidents and general managing officers of the two companies, in support of its averments. Their testimony placed the character of the entire transaction, and the intentions of the parties to it, beyond the limit of controversy or contention. After the coming in of this proof, appellant moved for the striking from the files of the receiver's cross-petition, and against the granting him of any relief as prayed for, because of lack of authority in him so to sue; because the money sued for was for earnings not covered by, nor recoverable by the receiver under the bondholders' mortgage or security; and because the officers of the Railway Company had made a previous *bona fide* application of such. Record p. 90.

This motion was overruled.

An order of reference was made to a commissioner for the stating of an account showing the amount retained by the Oil Company from freights hauled for it by the Railway Company, less rental, from October 6th, 1883, to January 1st, 1887. The report of the commissioner was confirmed; and a decree was entered in the receiver's favor, on his cross-petition, for $10,550.41, with costs; and, at the same time, a final decree was directed and entered, denying appellant any manner of relief on, and dismissing, its bill for the enforcement and collection of its claim of $6,732.15, and interest, as balance due it by the Railway Company, on account of its purchase of rolling stock; and in addition thereto, decreeing that the Oil Company pay to the receiver the sum of $3,729.82, held and claimed by it as justly applicable to the extinguishment, *pro tanto*, of the said balance of $6,732.15. Whereupon appellant prayed and has prosecuted these appeals—numbers 122 and 123.

The present appeal is from the decree of the District Court dismissing appellant's bill or petition to secure the payment of the said sum of $6732.15, and the adjudging against it of the payment over to the receiver, of the further sum of $3729.82, which it is entitled to hold in satisfaction of the first named demand.

ASSIGNMENTS OF ERROR.

The appellant specifies, and specially assigns, as error, in the Court below, its action in the following stated particulars, to wit:

1. Because the Court erred in dismissing appellant's bill or petition for the enforcement of its contract rights with the Mobile & Northwestern Railway Company, and in refusing to grant appellant the specific relief sought thereby, or such other equitable relief as was its due, under its prayer for general relief.

2. Because the Court erred in not directing that the amounts retained in its hands by appellant, on account of freight charges for services rendered by the Railway Coming, during the receivership, to the date of final decree herein, be held by appellant, as a credit on the balance of the purchase price, due by said railway company, on its contract and purchase of rolling stock; and in not directing that appellee, as receiver, then pay to appellant, the balance remaining due by said railway company, on account of said rolling stock purchase.

3. Because the Court erred in this, that the dismissal by final decree, of appellant's original bill or petition, carried with it, and operated as, a dismissal of appellee's cross-bill or petition, and the Court had no power, nor jurisdiction to decree otherwise; and none to enter a money decree against appellant, based on said cross-petition.

4. Because the Court erred in entering a money decree, against appellant, in favor of appellee, for the sum of $3729.82.

BRIEF AND ARGUMENT.

The errors assigned by appellant, on which it bases its expectations of a reversal of the decree from which this appeal is prosecuted, go directly to the merits.

The relationship between this appeal, and the preceding one, between the same parties, is so close, that it carries us over much the same ground as that traversed in presenting the former.

We think that the action of the District Court resulted not only in the denial of relief which appellant had the legal right to demand, but in the infliction of a direct hardship.

The desire to have the rulings of that Court on all matters at issue between the parties in interest, reviewed here, is the purpose of the present appeal.

A discussion of the First and Second Assignments of Error, involves a consideration of the merits of the entire controversy between the Railway Company and appellant, or, rather, between the *Receiver* of the Railway Company, and appellant, because there has not been, and is not now, any question of difference between the original parties to the contract, which appellant seeks to have enforced.

The manner in which the questions are raised, on which the Court is asked to pass, has been stated in the Abstract of the case.

If the contention of appellant is true, that the contract filed as "Exhibit A," to its original bill of complaint, is a valid contract so far as appellant seeks its enforcement, and is the character of contract which we contend it is, then appellant is entitled to its enforcement, whether the Receiver of the Railway Company wills it, or not.

It becomes necessary, therefore, precedent to a discussion of the rights of appellant under the contract, upon which appellant filed its bill for relief, fully to understand and determine the effect and force of the contract named, and the actions, and course of dealings of the parties to it, acting under and in accordance with its terms.

The circumstances leading to its execution have already been presented.

The contract as written, is a fair embodiment of the agreement of the parties.* The initial recitals, that the Oil Company has *agreed*—with whom, and for whom?—to purchase certain named rolling stock, from certain locomotive works, and at certain prices, import an action undertaken on its part, at the instance, and for the benefit, of some one else. From the face of the contract, it is patent that this other person was the Railway Company, and that the purchase throughout was, in fact, made by the Railway Company *through* the Oil Company; and that, as its security for such advances, the Oil Company was to assume the attitude of *original vendor* and make a *conditional sale* of the property to the Railway Company—the title to the property to remain in the Oil Company, only, "*until the said Railway Company* shall acquire title to it * * * in the manner hereinafter set forth."

* Copy of Contract, Appendix pages 1 to 5.

The first clauses of the contract, therefore, state the amount of the advances that the Oil Company undertook to make in behalf of the Railway Company, and how they were to be made, and then relating to the security which the Oil Company shall have for the advances named, define what that security shall be, making it to embrace both a reservation of title to itself—conceded by appellee's counsel to be valid under Mississippi decisions*—and, also, an undertaking on the Railway Company's part, common to all contracts of this character, to keep the rolling stock in repair, to operate the same on its line of railroad, and to hold the same *subject* to delivery to the Oil Company, *upon its demand*, in case of failure or refusal on the part of the Railway Company to meet its obligations at maturity.

These stipulations provided, the contract then declares the *unequivocal agreement* of the *Railway Company to purchase the property at a day named*—without any express, or inferential, condition, option, or stipulation, whereby such matured liability was to be escaped or avoided, *save only* by the *prepayment* of the amount or balance due on account of the purchase named, to stop the running of the so-called *rent*. A third stipulation provides a definite mode for the liquidation of the indebtedness due for the stock—principal and interest—denominated rent, a withholding by the Oil Company of certain earnings of the Railway Company, to be credited, *first*, on the *rental*, and, next, the surplus "*to go as a credit upon the purchase money of said property*." Interest on this surplus is allowed in exactly the same manner as is provided by the law merchant and Mississippi statutes, in all cases of partial payments on current indebtedness, and as a set-off against the interest stipulated to be paid in the way of rental. Record p. 26. Appendix, p. 6.

* Duke *vs.* Shackleford, 56 Miss. 552.

The manifest scheme, *which is, in all things, legitimate*, was, that the Oil Company should, and did, advance the money necessary to purchase the rolling stock for the Railway Company, and that the Railway Company should pay the Oil Company its advances, with eight per cent. interest, in installments, from freight earnings, as the services should be performed. The limitation of the contract, that is, the time the purchase money for the rolling stock should become due, was fixed at such a time as the parties estimated would be sufficient to enable the Railway Company to pay for the stock from such earnings; with this *option* only, in favor of the Railway Company, the right to purchase before the expiration of the limit fixed—which would operate to determine the payment of *rental;* in other words, put at an end the confessed relation of debtor and creditor, created thereby, and then and now subsisting between the two companies. And when, subsequently, it became manifest that the time so fixed had not been sufficient to enable the Railway Company to discharge its full indebtedness to the Oil Company, the limit was extended for an additional year, with the statement from the President of the Railway Company, that he would be able *to pay the whole balance off during that time*. Record, p. 39.

Disregarding its form, the contract, therefore, was, in effect, a manifest sale of the property to the Railway Company, under its *express agreement to purchase* at a given price, with the title reserved in the vendor until the purchase money should all be paid.* Payment of the interest due on the purchase money was provided for, as stated, by colorable payments of rent, and the surplus earnings remaining were to remain in the hands of the Oil Company—not "as a reserved fund belonging to the Railroad Company"—as counsel for appellee have contended,

* Harkness *vs.* Russell, 118 U. S. 663.

but were *to be applied* and *to "go as a credit upon the purchase money of said property."* Taking only the Railroad Company's accounts, and the testimony of its President alone, the contention of the receiver, as to any *option* on that company's part, is flatly contradicted and denied. Record, pp. 32–34.

The decisions upon contracts of this character are numerous in England and America. Many recent cases hold that where it is apparent that the contract, though nominally a *hiring*, is, in reality, a conditional sale, the courts will so regard it, looking to the substance rather than the form.* The intention of the parties, and the practical construction placed by them upon their contracts, prevail in every instance, over the mere language of the instrument.†

This being true, the contract stands before the Court, as stated, as, in effect, a *conditional sale*, with a right of rescission on the part of the *vendor*, in case the purchaser shall fail in payment of the purchase money. The vendor, however, has never sought rescission, but by its suit insists that the purchaser shall comply with and complete its obligation to purchase, by the continued making of paymemts which it is entirely able to make and to meet.

The receiver, however, in opposition to this view, contends that by the terms of this contract, an option was conferred upon the Railway Company to purchase, or not, according as it might

* Benjamin on Sales, Corbin's 3d English and 4th American Editions of 1884, §§ 393 and 425–433, and cases cited.
Hervey *vs.* Locomotive Works, 93 U. S. 664.

† Donahoe *vs.* Kettrell, 1 Clifford, 141.
Irwin *vs.* United States, 16 Howard, 523.
United States *vs.* Gibbons, 109 U. S. 200.
Mobile, &c., Ry. Co. *vs.* Jurey, 111 U. S. 592.
Harkness *vs.* Russell, 118 U. S. 663.
Topliff *vs.* Topliff, 122 U. S. 122.
District of Columbia *vs.* Gallagher, 124 U. S. 505.

be in financial condition to do so, on the 1st day of January, 1886, extended to January 1st, 1887, or if it should elect to do so at such time.

And the receiver seeks to defeat the relief sought by appellant, and to found a claim for relief on his cross-bill, solely on the assertion of such option or privilege. We urge that there is no foundation for such a contention to be derived from the language or terms of the contract, or when the contract itself is fairly considered and construed in the light of the acknowledged purposes and known intention of the parties in making it, and their uniform course of dealings, acting under, and interpreting it by a practical construction of nearly three and a half years.

The receiver of the Railway Company has assumed, and continues, the uninterrupted possession, control and use of the rolling stock, by the express assent of the Oil Company, and by the direct order of the Court made at the time of his appointment, and by subsequent order, continuing in force the contract in question.° This fixes a charge for its payment on both the income and corpus of the railroad property.* In no event could it tender or surrender the property to appellant and thereby become entitled to recover back the payments it has made towards its purchase. Even if the Oil Company had proceeded to exercise the right reserved to the vendor in all such cases, to regain possession of the property, no action would lie against it by cross-petition, or otherwise, at the suit of the Railway Company, or its receiver, to recover what was paid on account of such purchase.†

The receiver, however, does not base his rights to recover on any such ground. His case rests solely on the assertion of

* Kneeland *vs.* American Loan Co., 136 U. S. 89.

† Corbin's Benjamin on Sales, just cited, §§ 425–433.

° Record, bf 9° 11.

an option in the Railway Company to purchase or not, as its financial condition might warrant, or as it should elect, as already stated.

There is a manifest distinction, well stated by the authorities, between a hiring or lease, with the *privilege* or *option* to the lessee to purchase, and possession, as in the present instance, under a contract of *conditional sale, or unconditional undertaking to purchase.*

The language of the contract is plain and unaccompanied by any limitation of the obligation, or liability assumed. "The said Railroad Company further *agrees that it will, on or "before the said 1st day of January, 1886, purchase all of said "property from said Oil Company, and pay for it in cash the "cost price thereof.*"

This clause immediately succeeds the clause from which counsel have evolved their conception of the option contended for, as though it were, thereby, purposely intended to exclude from the contract and wholly preclude any such doubt or hypothesis as that they assert.

This "*insolvency clause*" is not coupled with, nor embodied in, nor as any part of, the *immediate contract* of the Railway Company *to purchase.*

It is only a part of the precedent scheme, whereby title was to become vested in the Oil Company, delivery of possession made to the Railway Company, *under contract*, on its part, *to purchase*, and the engines and cars required to be properly cared for, as a continuing security to the Oil Company for the large advances then made by it on behalf of the Railway Company, so that, in the event it should become necessary for the Oil Company, in default of payment by the Railway Company, to resort to such security, the Railway Company would be in position to turn the same over to the Oil Company in good order and condition. It was a simple condition annexed to

the use of the property, to preserve it from destruction and waste, for the joint benefit of both companies, incorporated in contracts of this character, and which has never been held to affect the title to the property in question, nor the contract rights and obligations of either party, with regard either to title or liability. The attitude of the parties before, and at the making of the contract, and their long course of dealings under it, show that such was the purpose, and the only purpose, intended to be answered by the clause referred to.

And when an extension was granted, the agreement was "that the time for the *purchase by the Mobile & Northwestern "Railroad Company of said engines and cars*" was extended, and *not* that the *privilege* or *option* to purchase was, in any manner, *granted, conferred*, or *extended* to it.

We insist that if any option at all existed up to January 1st, 1886, that such option was definitely determined at the time of, and by, the making of this last named agreement, and that the Railway Company then elected to purchase the property named, and stood bound thereby, to complete such purchase by January 1st, 1887, at the latest.

Aside from these considerations, mere inability to pay, as counsel insist, does not operate as a release from unconditional contract obligations. A man may, by positive contract, undertake to do what he will, and unless he shield himself by proper conditions, he will be held to his undertakings; and in all contracts, such conditions as are made impossible by the default of the party, or otherwise than by the act of God, are treated as direct promises. What could or should be done, will be enforced. Mere insolvency is no answer to process for debt.*

* Pollock on Contracts, 4th Eng. Ed., marginal pp. 380–388.

By the way of additional reasons that may be urged against the contention of any option, dependent on the solvency or will of the Railway Company, or any receiver, is the fact that at the time the contract was made, the parties to it knew that it was beyond the range of human possibility for the Railway Company to have on hand, or to accumulate, by January 1st, 1886, or later, any sufficient fund, in cash, to pay for the rolling stock mentioned. The Company was hopelessly insolvent. It had no rolling stock whatever, hence no earning capacity. It was n debt $250,00 on first mortgage bonds, with the interest on them, in arrears for from seven to eight and a half years; and the Katzenberger bill states the fact that it had paid no interest on any of its said indebtedness for several years past, and then owed, principal and interest threeon, about $400,000. Record, p. 5.

It was further indebted in large sums on unsatisfied judgments in the State Courts, rendered on debts incurred in the operation of the road. Record, p. 6.

That the Oil Company, under such circumstances, entered into a contract, requiring it to make large expenditures in the purchase of property for which it had no use, and which its charter gave it no right to own, subject, daily, to destruction, and to certain great deterioration in value, and depending for reinbursement on the contingency of some sudden Aladdin-wrought solvency of the Railway Company, or that the Railway Company sought to effect any such contract or agreement, it is impossible to conceive. To have done this, would have been for the Oil Company to contract, in advance, for the non-performance of the contract on the Railway Company's part. At the very time the contract was made, and from that date, continously, to December 15th, 1886, a receiver could have been applied for and appointed on any day it had pleased any

part of the bond, or judgment, holding creditors so to proceed; and, then, if the receiver's contention be true, there was never a day that the Oil Company could have hoped to see the purchase by the Railway Company consummated.

As opposed to this, how much more in consonance with sound legal judgment is the Oil Company's position, concurred in by the Railway Company itself, that this is a contract obligation of the Railway Company to repay timely advances made by the Oil Company to the Railway Company, for acquiring necessary rolling stock; and, as security, that the title to the rolling stock remain in the Oil Company, until the cost prices of the same, had been repaid from a fixed part of the income of the insolvent corporation; thereby, securing to the Oil Company reinbursement with certainty, under the terms of a contract which it was known, in advance, would be respected, and enforced, by a Court of Equity.

Even if it be conceded that there was an option in the company dependent on its ability to purchase, the receiver did not exercise it on the day fixed. He failed to notify appellant of his election until long after January 1st, 1887, and *has never yet* turned the rolling stock over to appellant "in good order" or *otherwise, nor offered to do so.**

Again, if it existed, the receiver must be held estopped to set up any such option, or right to elect under it, because his ability to purchase, and the necessity for him to do so in order to operate the road, are averred, and proved by appellant; and any supposed inability of the company to purchase, is waived by appellant in its answer to the cross-petition, and ample opportunity offered the receiver to complete the purchase the contract calls for. Record, p. 28.

* Texas & Pacific Railway Company *vs.* Marlow, 123 U. S. 687.

Proceeding, now, upon the hypothesis that the contract cannot be construed as an option, without force as against the Railway Company, but is, instead, an obligation enforcible on the demand of the Oil Company, we submit that the means adopted by the parties to effect the discharge of such obligation, is exactly in the line of what the law itself would have provided if no contract had been made.

The proof shows, conclusively, that at the time the Railway Company purchased, or contracted to purchase, the rolling stock in question from the Oil Company, and secured possession of the same in the manner stated, it was absolutely without the means to operate its road. Its business was on the verge of total suspension. The security of the bondholders would thereby have been, either destroyed *in toto*, or very seriously and materially lessened and impaired. This obligation to the Oil Company for necessary rolling stock was incurred, therefore, in conducting the business of the road, and in preserving its property from serious loss; and, as such, both at law, and in equity, its discharge became a permanent paramount lien on the earnings of the road, as against all general contract creditors, and against the bondholders themselves. Under such circumstances, the Railway Company had ample authority to pledge its earnings, and to execute a contract, hypothecating a particular portion of them for the discharge of appellant's claim.* The pledge was intended to cover only enough to meet the actual cash cost price of the rolling stock.

When the receiver was appointed he took the road, its property, including, under the express order of the Court, this rolling stock, and its income, subject to that pledge, and he was

* Laws of Mississippi, Appendix p. 6.
Jones on Railway Securities, §§ 114–120.
Teal *vs.* Walker, 111 U. S. 242.
Sage vs. Memphis & Little Rock Railway Co., 125 U. S. 361.
Freedman's Savings Co. *vs.* Shepherd, 127 U. S. 501.

bound to respect it. The railroad property and assets were subject to the same equities in his hands, as subsisted against them prior to ,and at the time of, his appointment. Payment would have been made to the Oil Company in full, if the road had continued in the hands of its officials. The earnings pledged to it would have been applied to that purpose; and the Oil Company has the right as against the receiver, to have the same earnings made by the road from the same source, applied in the same manner. If the receiver should refuse, as he did, to permit such application to be made, a court of equity has the right to direct the contract to be continued in force until the balance of the obligation to the Oil Company should be discharged. If, at the termination of the receivership, a balance should still remain due the Oil Company, the court has authority and should then direct the payment of such balance from the general earnings of the road.* And if there should still remain a balance due the Oil Company on its sale of said rolling stock, the equities of appellant as against the bondholders are so cogent and superior, that the court should charge such balance against the corpus of the property after sale, and decree its prior satisfaction.†

The Court below, however, refused to grant appellant any manner of special or general relief, such as it was entitled to, on the facts developed; dismissed its petition and rendered judgments in the receiver's favor, for specific amounts from which these appeals, numbered 122 and 123, are taken.

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* High on Receivers, § 394, a–h.

† Fosdick *vs.* Schall, 99 U. S. 235.
Hale *vs.* Frost, 99 U. S. 389.
Miltenberger *vs.* Logansport Railway Co., 109 U. S. 286.
Burnham *vs.* Bowen, 111 U. S. 776.
Union Trust Co. *vs.* Illinois Midland Railway Co., 117 U. S. 434.
Union Trust Co. *vs.* Morrison, 125 U. S. 591.
Kneeland *vs.* American Loan Co., 136 U. S. 89.

The Court in entering such decrees, arrived at its judgment by construing the contract as a lease, entirely unenforcible because it created and conferred an option only, as contended by the receiver, and imposed no obligation, otherwise, on the Railway Company.

This feature we have already discussed.

Counsel urged, also, in argument, in support of the motions made by them, at the October Term, 1888, of this Court, to dismiss, or affirm, these cases, and against the enforcing of the contract, that it is illegal and void, because of certain stipulations charged to be in contravention of public policy.

The specific agreement not to haul seed in bulk for any other corporation or person, is certainly void.

That to give all needed facilities and preference to the Oil Company is not. It must be held to mean only facilities and preferences authorized by law; under the rule that all inferences and presumptions, where possible, must be indulged in favor of and to support the legality of the several stipulations of a contract.*

Conceding, however, they are both illegal, the contract will stand notwithstanding, with their expurgation.

They are separable and independent of all other stipulations.

The rule cannot be controverted that where there are several separable promises, and the *consideration is tainted with no illegality*, though some of the promises are illegal, those that are legal will be enforced.

* Chicago & Alton Ry. Co. *vs.* Wiggins Ferry Co., 119 U. S. 616.

To avoid the unquestioned force of this proposition, the efforts of counsel are directed to demonstrate the "interdependent character" of the contract, that they may deduce thence, its entire illegality. Their position and arguments, however, are based on, and proceed from an erroneous statement of the language of the contract. We submit that on the former arguments presented by Counsel, on the motions made in 1888, on page 18 of their first brief, they *misquote*, and then found their conclusions on nothing save such erroneous quotations. A legitimate, *eo instante*, is transformed into an ultra unlawful provision. This is sought to be effected by connecting the agreement of the Railway Company "to use and operate said property upon the line of its railroad, and to turn the same over, should it at any time violate its *agreement*, (in the singular number), upon the demand of said Oil Company," with the void clause referred to, regarding the hauling of seed in bulk. Clearly this first clause has no connection whatever, with the subsequent one. It refers to, and embodies, only one, distinct agreement, to operate the rolling stock on the line of its own road, subject to the right of the Oil Company to demand a surrender of the property, if that be violated. It was with this understanding, and for this purpose, that the property was bought and sold by the Oil Company, and it was proper that the contract should express as much.

A contract must be presumed legal, and that presumption, aside from any other consideration, limits the application and effect of the agreement named, in the manner we have suggested. And further than this, the force of the clause cannot be extended by any manner of artificial construction.

This much, to state the facts as they are, and to avoid the danger of any misapprehension of the true terms of the instrument, we may proceed to apply the rule invoked to the point at issue.

In the first place, the *entire consideration moving from the Oil Company is pure, unquestioned* and *untainted*, the purchase and sale to the Railway Company, of rolling stock, at the factory prices; and there is, then, on the other hand, the separable undertakings, on that Company's part, to use and operate the same on the line of its road, and to consummate its purchase thereof within a certain time. These undertakings performed by the Railway Company, and its title becomes absolute. Certainly no such disassociated stipulations as those referred to, can be held to avoid the contract in all its parts.*

Neither the antecedent, continuing use of the property, nor the subsequent acquisition of the title to it, is made in any way dependent on the precedent performance of the void stipulation referred to. This determines the void clause to be independent of the remaining and other antecedent clauses of the contract.† The stipulation was, *ab initio*, an inoperative undertaking on the part of the Railway Company, injected into the contract, it is fairly reasonable to conclude from the subsequent conduct of the parties, by the Railway Company itself, to induce the advances to it for the purchase of rolling stock, and only the Oil Company could complain if it was thereby led into making a contract unenforcible in part. The Railway Company cannot complain that it undertook to do a vain thing. Its undertaking was mere *brutem fulmen*. It harmed no one, invalidated nothing.

The fact that this clause is so separable in law, and that other parts of the contract are not dependent on it, is demonstrated most clearly by the subsequent conduct of the parties.

* Erie Ry. Co. *vs.* Union Locomotive & Exp. Co., 35 N. J. Law, 240. Greenhood on Public Policy, Rules XXII–XXIII, p. 20, et seq. Pollock on Contracts, Marginal pp. 320–1.

† Hare on Contracts, pp. 587–589.

There has never been any enforcing of, nor desire on the part of the Oil Company, to enforce the particular objectionable stipulations of the contract above referred to. Much more than this, the Oil Company has never sought performance of those other certain parts of the contract, which, while not subject to the criticism of illegality, have been denominated as harsh and oppressive—the requirements that the Railway Company should build seed houses, and have its agents buy seed, and perform other like services for it.

The Oil Company avers that it has always disavowed any desire to seek performance or enforcement of any such privileges, exclusive or otherwise. It sought no such relief in its petition, and makes proof of the fact that the cost of all seed houses, and the salaries of all agents, were paid for by itself, *exclusively with its own funds.* Record, pp. 26–7.

The contract was, therefore, purged of any illegality by the conduct of the Oil Company under it, in refusing to accept any illegal benefits, and by reason of its failure to seek relief as to any of such matters in this proceeding. Appellant does not require the aid of any illegal or questionable stipulation to establish its title to the character of the relief prayed for by it in the original proceeding, and it is entitled to a decree, therefore, notwithstanding they may exist.*

As already suggested, the objectionable features were manifestly engrafted on the contract without the procurement of the Oil Company. It is entirely competent for parties, by subsequent acts, or agreements, to modify or annul the terms of a written contract in any desired particular.†

* Wilkinson & Co. *vs.* Reily, 47 Miss. 313.

† Teal *vs.* Bilby, 123 U. S. 578.

We suggest, further, as to this feature of the case, that, if in any particular, there may be a doubt as to the legality of any of the provisions of the contract, and a further doubt as to whether any confessed illegal provision should be extended to destroy the validity of the entire contract. the rule requires that the contract should be construed throughout so as to uphold its legality, and give it binding force in all particulars possible.[3]

We cannot but contend with confidence, in view of the circumstances attending the execution of the contract; the mutual understanding of both parties to it, of the intent and effect of the same, and of the end sought to be accomplished by its execution, coupled with a long. practical construction of its operative provisions, in harmony with the avowed purposes of the parties; the great benefit accruing to the Railway Company and its protected and unprotected creditors, from the advances made by appellant; the saving and preserving of its property from wreck, and the strong equities in appellant's favor arising therefrom, and hence pervading the entire transaction; that the Court should have given effect to the great valid body of the contract, under which relief was sought, by suitable decree, as prayed by appellant.

Its failure to do so was error, and should result in the reversal of this cause.

If from the views of the Court, appellant is not entitled to the grant of any relief on its bill, we contend that the action of the Court below in granting a money decree against appellant, cannot be sustained.

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3 Hobbs *vs.* McLean, 117 U. S. 567–575.
United States *vs.* Central Pacific Ry., 118 U. S. 235.

The entering of such a judgment was founded on the cross-petition of the appellee, under its prayer for general relief.

This was error. On the dismissal of the complainant's bill, by final decree on the merits, the parties should have been left to their rights of law.

There was no ground for equitable interposition on behalf of the appellee. The appellant was not averred to be insolvent, nor in the possession, or exercise, of any other immunity from liability to respond to all legal demands against it.

Hence, we urge that the Third and Fourth Assignments of Error are well taken.

They have for their support the rule that a cross-bill or petition is a mere dependency on the original pleading, as a matter and method of defence; and the dismissal of the original bill operates to dismiss the cross-bill.

The facts of the case at bar are such that the rule is applicable in all its rigidity.

The relief sought by the cross-bill was of a purely legal character; in effect, an action for money had and received, or for a balance on an open account.

There are no authorities which will warrant the retaining of a cross-bill, or petition, for the rendition of a personal money judgment, or that will sustain such a judgment when rendered, where the Court, on final hearing on the merits, dismisses the original bill, refusing to grant any relief upon it.

The rule in Mississippi is the same as that established by this Court; and there can be no exception in principle or

practice, engrafted on it, that can be made, by any manner of tortuous reasoning or construction, to embrace and save the judgment in this cause.*

We contend, therefore, that the Court having already determined the merits of the controversy, as raised by the original bill, against appellant, it had no jurisdiction to enter a decree against appellant on the cross-bill; that the only decree it did have jurisdiction to make, under the circumstances, having so determined, was an order of dismissal of the cross-bill, as well; and the Court having done otherwise, its action in entering a judgment against appellant was erroneous, as the assignments named, specifically state.

In conclusion, reverting, again, to the merits of the Oil Company's demand, we submit that a Court of Equity, under all the facts disclosed by the record, ought to afford that Company ample and adequate relief, and that this cause should be remanded, with such directions as will ensure the accomplishment of that end.

*Cross *vs.* Valle, 1 Wall. (U. S.) 1.
Dows *vs.* Chicago, 11 Wall. (U. S.) 108.
Gilmer *vs.* Felhour, 45 Miss. 627.
Jacks *vs.* Bridewell, 51 Miss. 890.
Belcher *vs.* Wilkerson, 54 Miss. 677.
Wright *vs.* Frank, 61 Miss. 32.
Story's Eq. Pleading, Sections 398, 398 a, 399.

Respectfully,

J. W. Lenton

APPENDIX.

COPY OF CONTRACT TAKEN FROM THE RECORD.

This contract, made and entered into on the 6th day of October, 1883, by and between the Sunflower Oil Company of Clarksdale, in the State of Mississippi, and the Mobile & Northwestern Railroad Company, both corporations under and by virtue of the laws of the State of Mississippi, witnesseth:

That the said Sunflower Oil Company has this day agreed to purchase of the Baldwin Locomotive Works, in Philadelphia, Penn., two locomotive engines and tenders complete, named, respectively, Le Flore and Yazoo, at the price of seventy-six hundred dollars each, making together the sum of fifteen thousand two hundred dollars, and to invest the further sum of two thousand four hundred dollars in box and flat railroad cars; all of which property the said oil company agree to lease unto the said railroad for the full period of time up to January 1st, 1886, at and for the sum of fourteen hundred and eight dollars per annum, said rental to be due and payable on the last day of each and every month, while this contract continues, in monthly installments.

Said locomotive engines and cars are to be bought and paid for in the following manner, to wit: The engine Le Flore and said cars are to be paid for by said oil company in cash, and are at once to be and continue its property until purchased by said railroad company in the manner hereinafter provided, and said locomotive engine Yazoo is to be purchased of said Baldwin Locomotive Works upon the obligation of said railroad company, guaranteed by the mercantile firm of J. T. Fargason & Co., of Memphis, Tenn., which guaranty the said oil company has agreed to procure for said purpose; which obligation is to be paid to said Baldwin Locomotive Works six months from this date, together with six per cent. interest, and until the payment of said obligation the title to said locomotive Yazoo is to be and remain in said Baldwin Locomotive Works. Should said railroad company pay said obligation at maturity the title

to said engine is to be in it, but should the said J. T. Fargason & Co. have to take up said obligation on account of their said guaranty, then the title to said locomotive Yazoo shall be and remain in said Sunflower Oil Company until said railroad company shall acquire title to it and the other said property in the manner hereinafter set forth.

Should said railroad company promptly meet said obligation to said Baldwin Locomotive Works for said engine Yazoo, then thereafter the rental of the property above named belonging to said oil company shall be eight hundred dollars per annum, payable in monthly installments at the end of each calendar month which this contract has to run.

The said railroad company further agrees and binds itself to take all proper care of said locomotive engines, tenders, and cars, and turn the same over to said oil company in good order and condition at the end of this contract, should said railroad company be then unable to purchase the same, at the price hereinafter mentioned; and said railroad company further agrees to use and operate said property upon the line of its railroad and to turn the same over, should it at any time violate its agreement, upon the demand of said oil company.

The said railroad company further agrees that it will, on or before said 1st day of January, 1886, purchase all of said property from said Oil Company and pay for it in cash the cost price thereof, but said railroad company shall have the right at any time before said 1st of January, 1886, to purchase the whole of said property by paying the cash price thereof to said Oil Company, and in the event it does so the contract of rental hereinbefore set out shall immediately cease and determine, but such purchase shall not have the effect of anywise impairing this contract so far as its other terms are concerned.

And said railroad company further agrees that it will within sixty days from this date erect houses at four, or more if necessary, of the depots on its said road for the purpose of receiving cotten seed in bulk for said oil company, and that it will have scales for weighing seed by the wagon-load, and that it will haul seed in bulk from the various points along the line of said railroad to Clarksdale, Miss., for said Oil Company. It

is further agreed that the agents of said railroad company along the line of its road will weigh cotton seed, purchase same, if desired, all free of cost for any service to said Oil Company. The said railroad company agrees that it will haul all sacks for said Oil Company free of charge, and that it will receive and haul all freights for said Oil Company at the Mississippi river opposite Helena, Ark., free of storage or commission. It is understood that the freight to be paid by said Oil Company to the said railroad company for hauling cotton seed in bulk or in sacks, or for any product of the mill or for supplies for said mill, shall be at reasonable rates, to be fixed at various times by the Presidents of said two companies, but the freight on seed in bulk is not to exceed $1.75 per ton, and freight on seed in sacks is not to exceed $2.00 per ton.

It is further agreed that said railroad company will not haul cotton seed in bulk for any other corporation or person, nor permit its agents to purchase or pay for cotton seed for any other corporation or person. The said railroad company further agrees to put in a switch or side track at Clarksdale, so as to reach the mill of said Oil Company, so as to load and unload freight at said mill.

It is further agreed that said railroad company will give all needed facilities and preference to the said Oil Company to enable it to control all cotton seed along the line of said railroad as it now is or as it may be while this contract is in force. All freight earned by said railroad company for hauling seed, supplies, or products of any kind for said oil company is to be credited on amount of the rental of said property, and should there remain a surplus after paying rent it is to remain in the hands of said Oil Company and go as a credit upon the purchase-money of said property. Interest is to be allowed said railroad company on such surplus at the rate of eight per cent. per annum. Said railroad company is to furnish said oil company a statement of freight due it at the end of each month while this contract continues, and the same is to be credited in the manner above stated.

This contract is to continue in force until the 1st day of January, 1886.

Witness the signatures of said companies, by their respective Presidents, this day and year first above written.

THOS. T. A. LYON,
President of the Mobile & Northwestern R. R. Co.

J. T. FARGASON.
President Sunflower Oil Co.

We, the undersigned, President and Secretary *pro tem.* of the Mobile & Northwestern Railroad Company, certify that on the 8th day of October, 1883, at a meeting of the directors of said company, held at their office in Memphis, Tenn., the following resolution was passed :

Resolved, That the contract made between Thos. T. A. Lyon, President of the Mobile & Northwestern Railroad Company, and Jno. T. Fargason, President of the Sunflower Oil Company, at Clarksdale, Miss., under date of October 6th, 1883, regarding the purchase of locomotive and cars, and hauling seed, &c., is approved and ratified.

THOS. T. A. LYON,
President.

JNO. R. FLIPPIN,
Secretary pro tem.

It is hereby agreed between the Sunflower Oil Company and the Mobile & Northwestern Railroad Company that the time for the purchase, by said Mobile & Northwestern Railroad Company, of the engines and cars of said Sunflower Oil Company mentioned in the foregoing contract be extended for one year from the first day of January, 1886, and that said contract and all the provisions thereof, with the change made in the time for the purchase of said engines and cars as aforesaid, shall be extended and continue in force until the 1st day of January, 1887.

MOBILE & NORTHWESTERN RAILROAD CO.,

By THOS. T. A. LYON,
President.

THE SUNFLOWER OIL COMPANY.

By J. T. FARGASON,
President.

STATE OF TENNESSEE, City of Memphis:

Before me, the undersigned, commissioner duly appointed and commissioned by the Governor of the State of Mississippi to reside in the State of Tennessee, and qualified to take acknowledgments of instruments of writing to be recorded in said State of Mississippi, this day personally appeared Thos. T. A. Lyon, President of the Mobile & Northwestern Railroad Company, and acknowledged that said railroad company and he, as President thereof, executed the foregoing two instruments of writing on the days and years therein mentioned.

Witnesss my hand and official seal this 22d day of September, 1886.

[L. S.] HUDSON CARY,

Commissioner for Mississippi, at Memphis, Tenn.

STATE OF TENNESSEE, City of Memphis:

Before me, the undersigned, commissioner duly appointed and commissioned by the Governor of the State of Mississippi to reside in the State of Tennessee, and duly qualified to take acknowledgments of instruments of writing to be recorded in said State of Mississippi, this day personally appeared J. T. Fargason, President of the Sunflower Oil Company, and acknowledged that said oil company and he, as President thereof, executed the foregoing two instruments of writing on the days and years therein mentioned.

Witness my hand and official seal this 22d day of September, 1886.

HUDSON CARY,

Commissioner for Mississippi, of Memphis, Tenn.

Filed for record, September 23d, 1886, at 2. P. M.

R. N. HARRIS,
Clerk.

By J. ALLEN, *D. C.*

SECTION 1033, OF CHAP. 38, OF THE REVISED CODE OF MISSISSIPPI, 1880.

"Mortgages or deeds of trust subordinate to certain claims."

Section 1033. No mortgage or deed of trust conveying the income on future earnings of any corporation, or the rolling stock of any railroad company, shall be valid against debts contracted in carrying on the business of the corporation, nor against liabilities incurred by railroad companies as carriers of freight and passengers, or for damages sustained by persons or property; but such mortgage or deed of trust shall be valid as against any claim in excess of five thousand dollars for damages to any person.

AN ACT IN RELATION TO THE LEGAL AND CONVENTIONAL RATE OF INTEREST; REVISED CODE OF MISSISSIPPI, 1880.

Section 1141. The legal rate of interest on all bonds, notes, accounts, judgments and contracts shall be six per cent. per annum, but contracts may be made in writing for the payment of a rate of interest as great as ten per cent. per annum. * * *

Section 1144. When partial payments are made on bonds, contracts or assurances that bear interest, the interest that has accrued up to the time of such payment, shall be first credited, and the residue of such partial payment shall be placed to the payment of the principal; and the same rule shall apply to all debts due by the judgment, sentence or decree of any Court.

Office Supreme Court U. S.
FILED.
NOV 27 1891
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1891.

THE SUNFLOWER OIL COMPANY—APPELLANT,

vs. } No. 122.

BENJAMIN WILSON, *Receiver of the Mobile and Northwestern Railway Company*—APPELLEE.

THE SUNFLOWER OIL COMPANY—APPELLANT,

vs. } No. 123.

BENJAMIN WILSON, *Receiver of the Mobile and Northwestern Railway Company*—APPELLEE.

Appeals from the District Court of the United States in and for the Western Division of the Northern District of Mississippi.

Briefs of Holmes Cummins and Edward Mayes,

ATTORNEYS FOR THE APPELLEE.

E. O. TOOF & CO., PRS. & LITHS., MEMPHIS.

Supreme Court of the United States

THE SUNFLOWER OIL COMPANY—APPELLANT,

vs. } No. 122.

BENJAMIN WILSON, *Receiver of the Mobile and Northwestern Railway Company*—APPELLEE.

THE SUNFLOWER OIL COMPANY—APPELLANT,

vs. } No. 123.

BENJAMIN WILSON, *Receiver of the Mobile and Northwestern Railway Company*—APPELLEE.

STATEMENT OF THE CASES.

On the 20th day of July, 1870, the Legislature of Mississippi incorporated the Mobile & Northwestern Railway Company, the object of the corporation being the construction and operation of a railroad from a point on the Mississippi river, in Coahoma county, Miss., opposite the city of Helena, Ark., in a southeasterly direction, across the State of Mississippi, to the Alabama line, and toward the city of Mobile.

The company was duly organized under its charter and proceeded with the work of construction. In, and prior to, the year 1877, it built and equipped about thirty-one miles of road, beginning at Dowd's Landing, now called Glendale, in Coahoma county, opposite Helena, Ark., and running southeasterly to Clarksdale, in said county.

On the 17th of March, 1877, for the purpose of raising money to build its road, the company executed a mortgage in the amount of $250,000, to secure a series of bonds to that amount, to be negotiated. Said mortgage embraced twenty-five miles of the road, from Glendale southeasterly, together with all appurtenances, and especially the *rolling-stock* and equipments, and *tolls and profits.*

In January, 1883, several parties, then creditors and directors of the company, proposed to go into a syndicate and purchase stock of the company, with the view of extending the road and of paying its debts. It was deemed necessary for the company to have new and more locomotives and cars. The President was advised to contract for two more locomotives, which he did, with the Baldwin Locomotive Works, of Philadelphia; the two locomotives to be completed in nine months from the date of contract, and to cost each $7600 in cash, f. o. b. cars at the works. In September, 1883, the only locomotive possessed by the company broke its cylinder. There was no chance to get a new one under six weeks. At this time the President found that the two new locomotives would be ready by the 1st of October; but the company had no money, and did not see the way to get the $15,200 needed to pay for the same. The railroad company was "financially pretty hard up." It did not have sufficient rolling-stock. It had not one locomotive in working order. (Tr. p. 32, ans. 3 & 4 of Prest. Lyon.)

Under these circumstances the President approached Mr. Fargason, the President of the Sunflower Oil Company, a concern which was located at Clarksdale. He disclosed to Mr. Fargason the needs and distress of the railroad company. The result of his approach was the making of the contract out of which this controversy has arisen. (Tr. pp. 32, 39, 40; ans. 3 of Lyon; ans. 3 & 4 of Fargason; ans. 4 of Littlejohn.) That contract is found on pp. 16–18 of the Transcript. The substance of it is, in brief, as follows:

The oil company agreed to purchase from the Baldwin Locomotive Works two locomotives and tenders complete, at the price of $7600 each, and to invest the further sum of $2400 in box cars and flat cars; and to *lease* all of said property to the railroad to January 1, 1886, for $1408 per annum, payable on the last day of each month. The engine LeFlore and the cars were to be paid for by the oil company in cash, and were at once to be and continue its property, until purchased by the railroad company, in the manner therein afterward provided. The engine Yazoo was to be purchased by the obligation of the railroad company, guaranteed by the mercantile firm of Fargason & Co., which guaranty the oil company undertook to procure, payable in six months, and until payment the title to the Yazoo to remain in the Baldwin Works. Should the railroad company pay the obligation at maturity the title to the engine was to vest in it; but should the same be paid by Fargason & Co., then the title "shall be and remain in said Sunflower Oil Company until said railroad company shall acquire title to it and the other said property in the manner hereinafter set forth. Should the railroad company promptly pay the obligation for the Yazoo, then the rents payable to the oil company were to be only $800 per annum, payable monthly. The railroad company agreed to take all proper care of the rolling-stock, and to turn the same over to the oil company in good order at the end of the contract, *should said railroad company be then unable to purchase the same at the price thereinafter mentioned;* and agreed to use the same upon the line of its road, and to turn the same over upon the demand of the oil company should it at any time violate its agreement. The railroad company agreed that it would, on or before the 1st of January, 1886, purchase all of said property from the oil company *for cash* at the cost price; but was to have the right at any time before that day to purchase the whole by paying the cash price thereof, in which event the rents were to stop, *but the other*

terms of the contract were to remain unimpaired. The railroad company agreed that it would erect houses at its depots, and provide scales, for the purpose of receiving cotton-seed in bulk for said oil company and weighing the same; that its agents should weigh and purchase seed for said oil company free of cost for such service; that it would haul seed in bulk for said oil company, and that it *would not do so for any other person or corporation;* that it would haul all sacks for said oil company free of charge, and that it would receive and haul all freights for said oil company at the Mississippi river, opposite Helena, free of charge for storage or commission; that the Presidents of the two companies should fix the rates for hauling seed, in bulk or sacks, mill product and supplies, at reasonable rates, but not to exceed $1.75 per ton on seed in bulk, and $2.00 on seed in sacks. It was further agreed that the railroad company should give "all needed facilities and preference to the said oil company *to enable it to control all cotton-seed along the line of said railroad as it now is or as it may be while this contract is in force.*" All freights earned were to "be credited on amount of the rental of said property, and should there remain a surplus after paying rent it is *to remain in the hands of said oil company* and go as a credit upon the purchase-money of said property. *Interest is to be allowed said railroad company on such surplus* at the rate of 8 per cent. per annum. The railroad company was to furnish monthly statements of freights "due it at the end of each month while this contract continues, and the same is to be credited in the manner above stated." The contract was to continue in force until the 1st of January, 1886.

On the said 1st of January, 1886, the following supplementary contract was made:

"It is hereby agreed between the Sunflower Oil Company and the Mobile & Northwestern Railroad Company that *the time for the purchase*, by said Mobile & Northwestern Railroad Company, of the engines and cars of said

Sunflower Oil Company, mentioned in the foregoing contract, *be extended for one year* from the 1st day of January, 1886, and that said contract and *all the provisions thereof*, with the change made in the time for the purchase of said engine and cars as aforesaid, shall be extended and continue in force until the 1st day of January, 1887."

The foregoing contract was not proven or recorded until September, 1886.

The railroad company was utterly insolvent. It never paid any interest on its bonded debt; and in November, 1886, M. H. Katzenberger and others, holders of certain of the bonds, filed a bill in the District Court of the United States for North Mississippi, at Oxford, praying for a foreclosure, and for a receiver pending the proceedings. The District Judge, Hon. R. A. Hill, granted the motion for a receiver, and appointed the appellee, Ben Wilson, to that office. Wilson duly qualified, took charge of the road, and began to operate the same under the orders of the court, using the rolling-stock aforesaid under an arrangement for that purpose.

On the 14th day of February, 1887, the appellant, which was not a party to the original bill, interposed by petition; setting up its contract, above mentioned, with said railroad company, and alleging that a balance of $6732.15 was due it on the purchase of said engines and cars, and praying that the receiver be required to carry out the provisions of said contract by continuing to carry freights for the appellant, and by allowing appellant to retain all moneys due and to be due the receiver for such services as credits on such rental and purchase-money accounts.

Thereafter the receiver answered said petition, denying that the said railroad company had ever made any binding contract to purchase said rolling-stock, and affirming that the pretended contract of purchase was in effect only a contract of rental, with an option to the railroad company to buy, which option that company had never exercised; that the whole contract was subject to a condition that

the railroad company should return the rolling-stock to the appellant, if it should be unable to pay for the same on the 1st of January, 1886; and that it was not so able; and that the contract was void as containing stipulations against public policy. Further, that appellant had retained, of freights earned from it by said railroad, a large sum of money in excess of the agreed rental; and so was indebted to the receiver in the sum of $10,258.86, being such excess; and for the recovery of this excess the receiver filed his answer in the nature of a cross-petition.

On the final hearing the case was submitted on the appellant's evidence alone, none being taken by the receiver.

The court was of the opinion that the relation between the oil company and the railroad company was only that of lessor and lessee, the sale feature of the contract being subject to a condition which fell in, being that of the inability of the railroad company to pay in cash on the day stipulated. It therefore decreed that the oil company pay to the receiver the sum of $10,550.41, being the excess of the earnings of the road remaining in the hands of the oil company over the amount due for rents, with the lawful interest.

And from that decision the appeal in cause numbered 122 is prosecuted.

At the same time an account was taken of the amounts due the receiver for the surplus of freights earned from the oil company by the railroad while in his hands, over the rents due the oil company for rolling-stock during the same period. This accounting resulted in a decree against the oil company, in favor of the receiver, for $3729.82; and from that decree the appeal numbered 123 was taken to this court.

THE SUNFLOWER OIL COMPANY—APPELLANT,

vs. } No. 122.

BENJAMIN WILSON, *Receiver of the Mobile and Northwestern Railway Company*—APPELLEE.

BRIEF AND ARGUMENT.

We maintain that the decision of the court below was correct and should be affirmed, and propose to support its correctness by two distinct and independent lines of argument.

First. Taking, for the present, the written contract made between the Mobile & Northwestern Railway Company and the Sunflower Oil Company as a lawful contract, the decision was in accordance with its true intent and meaning.

Second. That contract was in fact an unlawful one in some of its features, and those features such as to vitiate the whole, while the decision correctly declared the respective rights of the parties to this litigation in view of that fact.

1. We shall now consider the former proposition.

The Sunflower Oil Company and the Mobile & Northwestern Railway Company were citizens of Mississippi; the contract was made in Mississippi, and it was to be performed in Mississippi. It was therefore a Mississippi contract, and its construction and effect are to be determined by the laws of that State.

Hervey v. Rhode Island Locomotive Works, 93 U. S. 664.
Harkness v. Russell, 118 U. S. 663. 118 U S 425

In Mississippi the doctrine of conditional sales is fully recognized. The retention by the vendor as a security; the distinction between such a contract and a mortgage; the exemption (arising out of that distinction) from any obligation to place the instrument of sale on record, even as against a bona fide purchaser—all have been adjudicated and settled. It is a question not open to further discussion; it is a rule of property.

Ketchum & Cummings v. Brennan, 53 Miss. 596.
Duke v. Shackleford, 56 Miss. 552.

Nor is there any discord between the Supreme Court of Mississippi and this court on these propositions. The two courts are in perfect accord.

Harkness v. Russell, 118 U. S. 663.
Heidekoper v. Hinckley Locomotive Works, 99 U. S. 258.

The foregoing principles are not the controlling ones in this case. They are set forth briefly, for the sole purpose of freeing the case from any query which might occur to the court, as to whether there might not be some complication of statutory origin or of peculiar State ruling. The instrument before the court, and which dominates this aspect of the case, is now shown to be open to interpretation on its own merits wholly, unaffected by any local vagaries of either legislation or decision.

That contract is in the following terms:

"This contract, made and entered into on the 6th day of October, 1883, by and between the Sunflower Oil Company, of Clarksdale, in the State of Mississippi, and the Mobile & Northwestern Railroad Company, both corporations under and by virtue of the laws of the State of Mississippi, witnesseth:

"That the said Sunflower Oil Company has this day agreed to purchase of the Baldwin Locomotive Works, in Philadelphia, Pa., two locomotive engines and tenders complete, named, respectively, LeFlore and Yazoo, at the price of $7600 each, making together the sum of $15,200, and to invest the further sum of $2400 in box and flat railroad cars; all of which property the said oil

company agrees to lease unto the said railroad for the full period of time up to January 1, 1886, at and for the sum of $1408 per annum, said rental to be due and payable on the last day of each and every month, while this contract continues, in monthly installments.

"Said locomotive engines and cars are to be bought and paid for in the following manner, to-wit: The engine LeFlore and said cars are to be paid for by the said oil company in cash, and are at once to be and continue its property until purchased by said railroad company in the manner hereinafter provided, and said locomotive engine Yazoo is to be purchased of the Baldwin Locomotive Works upon the obligation of said railroad company, guaranteed by the mercantile firm of J. T. Fargason & Co., of Memphis, Tenn., which guaranty the said oil company has agreed to procure for said purpose; which obligation is to be paid to said Baldwin Locomotive Works six months from this date, together with six per cent. interest; and until the payment of said obligation the title to said locomotive Yazoo is to be and remain in said Baldwin Locomotive Works. Should said railroad company pay said obligation at maturity the title to said engine is to be in it; but should the said J. T. Fargason & Co. have to take up said obligation on account of their said guaranty, then the title to said locomotive Yazoo shall be and remain in said Sunflower Oil Company until said railroad company shall acquire title to it and the other said property in the manner hereinafter set forth.

"Should said railroad company promptly meet said obligation to said Baldwin Locomotive Works for said engine Yazoo, then thereafter the rental of the property above named belonging to said oil company shall be eight hundred dollars per annum, payable in monthly installments at the end of each calendar month which this contract has to run.

"The said railroad company further agrees and binds itself to take all proper care of said locomotive engine, tender and cars, and turn the same over to said oil company in good order and condition at the end of this contract, should said railroad company be then unable to purchase the same, at the price hereinafter mentioned; and said railroad company further agrees to use and operate said property upon the line of its railroad, and to turn the same over, should it at any time violate its agreement, upon the demand of said oil company.

"The said railroad company further agrees that it will, on or before said 1st day of January, 1886, purchase all of said property from said oil company and pay for it in cash the cost price thereof; but the said railroad company shall have the right at any time before said 1st of January, 1886. to purchase the whole of said property by paying the cash price thereof to said oil company; and in the event it does so, the contract of rental hereinbefore set out shall immediately cease and determine; but such purchase shall not have the effect of anywise impairing this contract so far as its other terms are concerned.

"And said railroad company further agrees that it will, within sixty days from this date, erect houses at four, or more if necessary, of the depots on

its said road for the purpose of receiving cotton-seed in bulk for said oil company, and that it will have scales for weighing seed by the wagon-load; and that it will haul seed in bulk from the various points along the line of said railroad to Clarksdale, Miss., for said oil company. It is further agreed that the agents of said railroad company along the line of its road will weigh cotton-seed, purchase same if desired, all free of cost for any service to said oil company. The said railroad company agrees that it will haul all sacks for said oil company free of charge; and that it will receive and haul all freights for said oil company at the Mississippi river, opposite Helena, Ark., free of storage or commission. It is understood that the freight to be paid by the said oil company to the said railroad company for hauling cotton-seed in bulk or in sacks, or for any product of the mill or for supplies for said mill, shall be at reasonable rates, to be fixed at various times by the Presidents of said two companies; but the freight on seed in bulk is not to exceed $1.75 per ton, and freight on seed in sacks is not to exceed $2.00 per ton.

"It is further agreed that said railroad company will not haul cotton-seed in bulk for any other corporation or person, nor permit its agents to purchase or pay for cotton-seed for any other corporation or person. The said railroad company further agrees to put in a switch or side-track at Clarksdale, so as to reach the mill of said oil company, so as to load and unload freight at said mill.

"It is further agreed that said railroad company will give all needed facilities and preference to the said oil company to enable it to control all cotton-seed along the line of said railroad as it now is or as it may be while this contract is in force. All freight earned by said railroad company for hauling seed, supplies, or products of any kind for said oil company, is to be credited on amount of the rental of said property, and should there remain a surplus after paying rent it is to remain in the hands of said oil company and go as a credit upon the purchase-money of said property. Interest is to be allowed said railroad company on such surplus at the rate of eight per cent. per annum. Said railroad company is to furnish said oil company a statement of freight due it at the end of each month while this contract continues, and the same is to be credited in the manner above stated.

"This contract is to continue in force until the 1st day of January, 1886.

"Witness the signatures of said companies, by their respective Presidents, this day and year first above written.

"THOS. T. A. LYON,
"Pres't of Mobile & Northwestern R. R. Co.
"J. T. FARGASON,
"Pres't Sunflower Oil Co."

"We, the undersigned, Pres't and Sec'y *pro tem.* of the Mobile & Northwestern Railroad Company, certify that on the 8 day of Oct., 1883, at a meeting of the directors of said company, held at their office in Memphis, Tenn., the following resolution was passed:

"Resolved, That the contract made between Thos. T. A. Lyon, Pres't of the Mobile and Northwestern Rail Co., and Jno. T. Fargason, Pres't of the Sunflower Oil Company, at Clarksdale, Miss., under date of Oct. 6, '83, regarding the purchase of locomotive and cars and hauling seed, &c., is approved and ratified.

"THOS. T. A. LYON,
"*President.*

"JNO. R. FLIPPIN,
"Sec. *pro tem.*

"It is hereby agreed between the Sunflower Oil Company and the Mobile and Northwestern Railroad Company, that the time for the purchase, by said Mobile and Northwestern Railroad Company, of the engines and cars of said Sunflower Oil Company, mentioned in the foregoing contract, be extended for one year from the first day of January, 1886, and that said contract and all the provisions thereof, with the change made in the time for the purchase of said engine and cars as aforesaid, shall be extended and continue in force until the first day of January, 1887.

"MOBILE & NORTHWESTERN RAILROAD CO.,
"By Thos. T. A. Lyon, Pres't.
"THE SUNFLOWER OIL COMPANY,
"By J. T. Fargason, P't.

Such is the contract presented in this cause for the court's construction. His Honor below well said of it, both that it was "very unusual in its terms," and that it was "not very difficult to construe and understand."

It will probably be of service to determine what the contract is not, by way of preliminary to the consideration of what it is.

First. The contract is not a mortgage. In the case of Herryford v. Davis, 102 U. S. 235, this court construed a contract executed under conditions somewhat similar to those of this cause, and held the contract to be, not a conditional sale, nor yet a lease, but a mortgage. But the contract in that case was radically different from this contract. Amongst other differentia may be observed these: (1) in that case the court points out and emphasises the fact that, not only was no payment of hire provided for or required, but all intention to demand it was negatived by the strongest implications; while here, not only is hire expressly stipulated and exactly fixed, but also the pay-

ment of it, month by month, secured by the most stringent provisions; (2) in that case, as again the court points out and emphasises, the alleged seller took the notes of the alleged purchaser for all of the price of the cars, and exacted collaterals for security; while here the relation of debtor and creditor never existed between the railroad company and the oil company, nor, indeed, could exist consistently with the terms of the contract, which expressly twice provides that the purchase, when made, shall be "in cash"; *a* (3) in that case, also, the court points out that the cars when taken back by the alleged vendor, on non-payment, were to be taken back, not as owner, but as a trustee for sale; while in the case at bar, in case of surrender of the cars because of inability to purchase, the surrender was to be absolute, and the oil company to take as owner.

However, it is not necessary to dwell upon this point. The oil company does not claim that the transaction was a mortgage. It itself characterizes it as a "contract of rental and purchase." So that, as to the question of mortgage or no, both sides are agreed; and we have shown briefly, that such accord will stand the test of judicial scrutiny.

Secondly. That contract is not an absolute sale. It is not necessary to dwell upon this proposition. Its correctness is manifest, on even the most cursory reading of the document. It is about as replete with conditions as is possible. Over and over again, the title to the property is expressly declared to be withheld from the railroad until it shall be purchased ("for cash," twice); and the supple-

a It is true that as to one engine the railroad company was to execute a note to the Baldwin works, to be guaranteed by Fargason & Co. But neither of those concerns were parties to this contract. The oil company, the contracting party, was not, in any way, a party to the note. If Fargason & Co. should be compelled to pay the note the contract expressly provided, not that the engine should be sold for reimbursement, but that the title should vest in the oil company, the manifest implication being that such company should be the purchaser and assume the exoneration of Fargason & Co.

mentary agreement executed 1st of January, 1886, extends "the time for the purchase" one year from that date.

This court has gone all over this ground in Harkness v. Russell, 118 U. S. 663; and in its opinion is quoted approvingly this sentence from Barrett v. Pritchard, 2 Pick. 512: "*It is impossible to raise a doubt as to the intention of the parties in this case, for it is expressly stipulated* that the wool before manufactured, after being manufactured, or in any stage of manufacturing, shall be the property of the plaintiff until the price be paid," etc.

It being therefore easily certain that this contract is neither a mortgage nor yet an absolute sale, it remains to say what it is. That is readily done. The controlling provisions of the agreement on this head are these:

1. The oil company agrees to buy from the Baldwin Works certain rolling-stock, to be paid for by the oil company in cash, except as to one engine; and all the rolling-stock to be the property of the oil company, except that one engine.

2. The excepted engine is to be purchased with a note of the railroad company, guaranteed by Fargason & Co., whose guaranty the oil company is to obtain. This note, the railroad company may pay "promptly," "at its maturity," and thereby acquire title to that engine, the title meanwhile remaining in the Baldwin Works. But if the railroad company fail to pay "promptly," "at its maturity," and the guarantor pay it, then the title is to vest, not in the guarantor, but in the oil company.

3. During all this time the railroad company owes to the oil company no debt for the rolling-stock; but on the contrary pays monthly rent for it; actual rent, not colorable and amounting to payment of principal, as in Harvey v. Locomotive Works, 93 U. S. *supra*.

4. The railroad company binds itself, moreover, to purchase, "for cash," on the 1st day of January, 1886, all of the rolling-stock, at original cost price, with an option, however, to buy it before that day. It is not correct to say that the railroad company had an option to purchase on that day, which option it must have affirmatively exercised. That expression imports more liberty than the railroad company enjoyed. It was bound to purchase on that day, with one (and only one) condition, that of *ability to pay in cash on that day.*

5. If on the 1st of January, 1886, (or 1st of January, 1887, as extended by the supplemental agreement) the railroad company was unable to pay in cash, not for a part, but for the whole, of the rolling stock, the full cost price of $17,600, then also it was bound (not any option) to return the whole property, absolutely, unconditionally, and without any reserved rights.

6. Pending the lapse of the time during which the contract was to run; pending the solution of the problem of ability to pay $17,600 in cash on the ultimate day fixed, and as a safeguard against the unrestrained dissipation of the railroad's earnings in other quarters, a sort of savings bank was contrived. All the freights earned from the oil company were to be held back and credited to the railroad company: first, for the extinguishment of the rents, and secondly, as a reserved fund belonging to the railroad company, and on which it was to receive that allowance, impossible, except on a debt owing, interest. It is idle to speak of this surplus going as a credit on the purchase money at any time prior to the 1st of January, 1887; there was no purchase money owing; the whole question of sale or no sale was in reserve, was to turn on the inexorable conditions of ability to pay in cash, for the whole of the rolling-stock, $17,600, on the 1st of January, 1886, (1887, as extended); meanwhile, the surplus over rents was drawing interest, and was in effect a special deposit, non-

removable, except in one contingency—that of inability to buy as aforesaid. Nor could such surplus be treated as a payment for any part of the rolling-stock. Except in the one instance, strictly limited to the payment of the note to the Baldwin Works "promptly," "at its maturity," there was no contingency under which the railroad company could buy any portion of the rolling stock. Always, after the title to the Yazoo vested in the oil company, it was the whole that must be purchased; the whole or none; so runs the bond.

The contract, therefore, was this: A composite instrument, including a contract to sell and to buy on a day certain, conditioned on the ability of the proposed purchaser to pay in full in cash on that day, and with an option to the purchaser to buy, for cash in full, at any time before that day; in the meanwhile, a lease for a fixed monthly money rent.

In fact, the fates decided against the sale. The one contingency upon which the purchaser was to be free from its agreement to buy, happened; that is to say, the inability to pay in full in cash on the day fixed. On the extended day, the 1st of January, 1887, the railroad company was broke, and its assets in the hands of a receiver under foreclosure proceedings.

In this suit, the oil company occupies the remarkable attitude, that in the very contingency which it foresaw, and for which in its contract (and a thorough blood-warrant it is) it provided its own remedy, it resists the exact and literal performance of its own peremptory provisions.

Let the court remember clearly that the express provision of the controlling paragraph is: "The said railroad company further agrees and binds itself to take all proper care of said locomotive engine, tender and cars and turn the same over to said oil company in good order and con-

dition at the end of this contract, should said railroad company be then unable to *purchase* the same, at the price hereinafter mentioned." "To purchase the same;" not "to pay" for the same as now purchased and agreed on.

That difference is the key to the whole contract.

Nor was this word, "purchase," as distinguished from the word, "pay," used inadvertently. The internal evidence is clear that it was used deliberately and designedly. It is a repetition of the same word, used in the same way, in two other places in this contract; and it was again used twice in the same way in the contract for extension.

The appellant endeavors to meet the foregoing considerations in two ways: first, by a general denial as to the correctness of the interpretation placed upon the instrument, as to which difference this court will of course be the arbiter; secondly, by appealing to what it alleges to be the practical construction placed upon it by the parties, it claims that the parties by that practical construction, shows that the surplus of freights earned from the oil company over the amount needed for the discharge of the monthly rent, was to go immediately as a credit on the purchase money (principal), and did not constitute any reserved fund such as appellee claims it did; all of which, it is claimed, contradicts this theory of appellee's case. As authorities bearing on this view, appellant, in the only brief yet filed by it, cites Donahoe v. Kettrell, 1 Clifford 141; Irwin v. United States, 16 How. 523; United States v. Gibbons, 109 U. S. 200; Mobile &c. Ry. Co. v. Jurey, 111 U. S. 592; Harkness v. Russell, 118 U. S. 663; Topliff v. Topliff, 122 U. S. 122; District of Columbia v. Gallagher, 124 U. S. 505.

We do not, of course, challenge the rule laid down in those cases. We do challenge the application of that rule, here attempted.

Let us get a clear conception of the rule itself.

The case of Donahoe v. Kettrell is not accessible to us; however, it cannot materially differ from the other cases cited, since if it did they would overrule it.

Three of the other cases relied on by appellant, are useless and uninfluential in this connection, for the reason that the point to which they are cited was not raised in them. No such question as that of the admissibility of parol evidence of the subsequent practical construction by the parties, to aid in the judicial interpretation of written contracts, was raised in either United States v. Gibbons, Mobile &c. Ry. v. Jurey, or Harkness v. Russell. In the two last, the familiar doctrine was announced that such contracts would be construed in the light of the circumstances existing at the time of their making.

The rule, therefore, must be deduced from the three other cases: Irwin v. United States, 16 Wall. 523; Topliff v. Topliff, 122 U. S. 122, and District of Columbia v. Gallagher, 124 U. S. 505.

From them are clearly deducible the four principles following: 1, to render such testimony admissible, the terms of the written instrument must be ambiguous, or else a latent ambiguity must have been disclosed by parol, which parol may remove; 2, there must not only be ambiguity, but it must also be in respect to such matter that the execution of the contract necessarily involves a construction thereof, and that construction must be made in a practical way by acts done in such execution; a mere intellectual interpretation or understanding, for instance, is not within the rule; 3, the construction must be such that the two parties concur, the interpretation must be one; 4, and the result contended for, as fixed by such practical construction, must be within the terms of the contract, not counter to them or outside of them.

Now, we respectfully submit that appellant's case does not come within any one of those principles; still less within all of them, as it must do.

1. On the point under investigation in this connection the contract is not in ambiguous terms. On the contrary it is quite clear, and the court needs no extrinsic aid to construe it. The contract says: "All freight earned by said railroad company for hauling seed, supplies, or products of any kind for said oil company, is to be credited on amount of the rental of said property, and should there remain a surplus after paying rent it is to remain in the hands of said oil company, and go as a credit upon the purchase money of said property. Interest is to be allowed said railroad company on such surplus at the rate of eight per cent. per annum. Said railroad company is to furnish said oil company a statement of freight due it at the end of each month while this contract continues, and the same is to be credited in the manner above stated." Here it is expressly stipulated that the surplus is to "remain in the hands of the oil company, and that so remaining interest is to be allowed on it. If the oil company were to immediately appropriate it to the partial payment of purchase money, as the appellant now contends for, the plain language of the contract would be violated, for it would not remain, but would have been disposed of. It is true the sentence says the surplus shall "go as a credit on the purchase money"; but it is both to remain and draw interest *and* to go as a credit. There is no inconsistency. The *time when* it is to go as such credit is not fixed in this sentence, that is done elsewhere. But it is fixed that it is not so to go just yet, for it is to remain and draw interest for a time. It is so to go on the 1st of January, 1886 (1887), the day fixed for the purchase. This view is made conclusive by the fact that the railroad company had not the privilege of any partial purchase. The contract is emphatic on that. It says: "The said

railroad company further agrees that it will, on or before said 1st day of January, 1886, purchase *all* of said property from said oil company, and pay for it in cash the cost price thereof, but said railroad company shall have the right at any time before said 1st of January, 1886, to purchase *the whole* of said property by paying the cash price thereof," etc. Always, it is the whole that is to be bought, if any; the only exception being in the case of the payment by the railroad, "at maturity" of the note for the engine Yazoo. And this view is twice insisted on in the pleadings of appellant itself. See transcript, marginal pages 41 and 45. It is manifest, therefore, that as the company had not the privilege of purchasing part of the property, but must buy all or turn over all, it would make no partial payments. The simplest dictate of common sense would be to hold the question of any payment in abeyance, in order to ascertain the outcome of the problem of ability to pay in full on the day fixed. Hence the stipulation that the surplus should "remain" in the hands of the oil company, and draw interest. It was one of the remarkably few items in this contract in favor of the railroad company.

2. The same analysis of the terms of the contract shows that the so-called "practical construction" of it insisted on by the appellant is liable to the objection that it is not within the terms of the contract. It is, indeed, as we have sought to show, directly in the teeth of those terms.

3. Nor, again, was such pretended construction made in such a practical way as the rule requires, what would be such a construction? The usual, indeed we might say, the invariable custom in the case of conditional sales, such as are intended to raise a present relation of debtor and creditor between the parties, is for the purchaser to execute to the seller some sort of obligations to evidence the indebtedness. None such were executed in this case.

The fact that the parties refrained from giving and taking the ordinary evidences of such relation, where the amounts were so large, and the time so long, is a strong circumstance of practical construction, if such matter be taken as admissible at all, to show that they did not intend that any such relation should presently arise.

The only practical construction which will be at all influential in support of the position taken by the appellant in this litigation, would be to show that the parties did in fact, from time to time, agree, and did actually make appropriations of the surplus to the extinguishment *pro tanto* of a recognized present indebtedness, absolutely and unconditionally recognized to be owing. But the proof falls far short of this. There are certain expressions used by the witnesses which, taken apart from other explanatory and modifying expressions, and apart from the attendant circumstances in the light of which they should be interpreted and limited, afford an illusory support for such a theory; but the theory will not bear a full investigation.

The witnesses who speak to this point are three, all for the appellant—Mr. Lyon, the railroad president; Mr. Fargason, the oil company's president, and Mr. Littlejohn, the oil company's secretary. Their testimony is as follows:

Mr. Lyon said: "The railroad company charged up to Sunflower Oil Company all freights hauled for said oil co., and in making up account allowed 8 per cent. interest on sums of money paid out by said oil Co., up to Jan'y 1, '85, charging 8 per cent. interest on all sums due by Sunflower Oil Co. up to same date, & so for the following year, &c. * * * Some time the last of August, or early in Sept., '86, an account was made up by me up to Aug. 15, '86, showing the full transactions between the railroad and oil co., excepting I failed to charge up one pair of platform scales. This account was made up for the purpose of having a settlement, as oil co. had sold out to American Trust Co., as I understood. I did not retain detailed statement of said account, but did keep memorandum of the general ac., showing aggregate credits and debits, as given on next page. * * * (Here follows a short balance-sheet, concluding) * * * Bal. due Oil Co., Aug. 15, '86, $9,258.33.

"My understanding was that the above account was agreed to be the true and correct amount due to the Sunflower Oil Co. on Aug. 15th, 1886. On Dec. 20, 1886, I made out an account against said oil co. from Aug. 15, '86, showing balance due said Sunflower Oil Co. of $7,023.26, which I consider due on the locomotive and cars, excepting that said oil co. still owes railroad co. for one pair platform scales.—Ints. 5 & 7.

"4th. X. * * * *no receipts ever exchanged*, but each month statement made of quantity of cotton seed and other freight hauled by railroad for Sunflower Oil Co. by the railroad Co. The credits of what had been paid out by the Sunflower Oil Co. was not until some time in August or Sept., 1886. The reason this entry was made was because the Sunflower Oil Co. sold to other parties and wanted a settlement of ac's, so as to show amounts due by R. R. Co. to Aug. 15, '86. This ac. is stated in answer to direct question no. 7, and shows railroad Co. owed $9,528.83. The Sunflower Oil Co. claimed a larger sum, claiming under contract, they were to charge so much per month, while I claim my account was correct, as per my understanding, and Mr. J. T. Fargason, pres't, agreed that $9,528.83 was the proper amount. On Dec. 20th I made out ac. against Sunflower Oil Co., as per same basis of settlement or agreement in August. This account showed bal. due of $9,023 26.

In order to understand the exact force and significance of this testimony, it is necessary to revert to Mr. Lyon's answer to int. 5, such answer being moreover, in immediate connection with this passage. He there says:

"My opinion at the time of the contract, Oct. 6, '83, with the Sunflower Oil Co., was that they would buy the property and own same until railroad company had paid for the whole, with interest at 8 per cent. on amounts paid out, allowing 8 per cent. on amounts due railroad company. Of course, I never had any idea but that the R. R. company would *eventually* become the *purchaser* and owner of the rolling stock, such being my idea when contract was made."

In the light of this "idea" of President Lyons, that the railroad "would eventually become the purchaser and owner," and of the fact that such was also the idea of President Fargason, as shown by his own testimony (see answ. 5, page 39), and of the further fact that the oil company in its answer in this very cause emphatically denies that the railroad had acquired any title to any part of the property (whereby it negates any change of, or departure from the terms of, the contract as originally framed); so

let the court interpret Mr. Lyon's testimony. So interpreted it means just this, and no more: that in conformity with the original contract mutual accounts were kept, the respective items of which constituted, not payments, but offsets, a *mutual* account; that on one occasion, because of a proposed sale of the oil company to a trust, it became necessary to ascertain how that mutual account stood on a certain day, not by way of settlement between the railroad and the oil company, but only because the oil company needed a general statement of its assets, and among others of what sums were available to it for future margin as against the railroad whenever the time should come under the contract for a settlement with that company, so that it might exhibit such margin to the proposed purchaser; that such statement was not made for the purpose of altering the status in any way so far as the railroad company was concerned, it standing as before it did on its contract. And all of this so-called settlement was a mere tentative statement; it was not *extra* the contract, but *under* it, and consequently subject to whatever conditions or reservations were in the contract as originally framed—the controlling condition in this respect being, as already shown, that in the event the company should be unable to pay in full on the day named, and thereby take the property, then the whole contract of purchase should be thereby nullified; the legal consequence being that the oil company in that event must account for freights earned, since the law will not imply a forfeiture in favor of one who has elected in making his contract to have another remedy.

The witness Littlejohn, in his testimony, tries to give a different color to the whole matter. He puts it as a "final" settlement; calls it such. Unfortunately for him the very record made by the company herein shows that it was not such. There is a record estoppel in this respect. His testimony on this point (answers 7 and 8) will be

found on pages 41–43 of the Transcript. Even his own answers show that the parties were at variance in respect both to the principles on which any estimate of the status of the mutual account should be made, and in respect to the condition of that account. He tries to convert into a final settlement and a final mutual application of credits as between the railroad company and the oil company that which was manifestly a mere estimate of the status made for an outside purpose of the oil company's alone; tries, in other words, to give it an effect not intended by either president; certainly not by President Lyon. This witness writes his own deposition. That document bears irrefutable internal evidence of the fact that Mr. Littlejohn had posted himself on the legal needs of the case, and was writing with his eyes firmly fixed on those needs. It is a suspicious deposition.

Mr. Fargason's evidence on these points is a mere echo of Littlejohn's. They say that receipts were passed. In this they are contradicted by their own witness, Mr. Lyon, who says that none passed. (See x int. 4, page 34.) And they do not produce any. Compare his answer to int. 5, on page 39 of Transcript, which is as follows: "I regard the contract entered into with the railway company as a contract to pay rental on the rolling-stock until the end of the contract, and *then to buy and pay for* the rolling-stock, and the railway company knew of this construction being placed upon the contract by the Sunflower Oil Company, and did acquiesce in such contract, and did at all times act as though it held similar views as to the contract."

Here the President of the oil company, the appellant, says expressly, and under his oath, that not only the buying but also the *paying* was to be done not "until the end of the contract," and that the railroad company so understood it and did at all times act accordingly; and yet, because of a turn in affairs which makes it profitable to

give another color to the matter, it is now sought to convert the transaction of August, 1886, into a "final" settlement, as Mr. Littlejohn calls it.

That this idea of a "final settlement," including an actual application of payments, etc., is nothing but an afterthought, growing out of the needs of this case, is shown by the oil company's original petition herein, Transcript, marginal page 22. It was thus: "Said contract was to continue in force until the 1st day of January, A. D. 1886, on or before which said date the said railway company undertook and obligated itself to purchase from said oil company *all* of said rolling-stock and property at the *aggregate* price said oil company have paid for the purchase thereof, to-wit: the sum of $17,600, less the amount of the surplus, if any, with the interest thereon, as aforesaid, that should or might remain in the hands of said oil company AT THE DATE AFORESAID." Here then is the admission made of record that the surplus was to accumulate, and be not disposed of, not even by any partial settlement. For the statement is explicit that on or before the 1st of January, 1886, the purchase was to be made by the payment of the *aggregate* sum of $17,600, less (not such surplus as might have been earned from time to time, and from time to time credited), but the surplus actually in the hands of the oil company on the 1st of January, 1886.

4. The fourth test of a "practical construction" is that the parties did in fact agree. But in the transaction of August, 1886, which is here sought to be wrested into such a construction, the testimony shows that they did not agree. See Lyon's 4th x-ans., page 34, also Littlejohn's 7th ans., page 42. These answers show that the parties were at discord as to the interpretation of the contract and the principles on which a settlement under it was to be made. It is true they did finally accept a certain balance as the balance against the railroad still remaining uncovered by offset for freights earned; but as

Mr. Lyon and Littlejohn both show, that balance was accepted by the oil company, not as the correct one under the contract, but as one it would submit to, although extra the contract, because of its desire to make a definite exhibit of some sort to the proposed purchaser, the trust company.

We submit, therefore, that the claim of a practical interpretation, controlling on the court, is without foundation in fact. Such was the view of the court below; and the court's view was the correct one. It said: "As the record shows, before this last time arrived (i. e., January 1, 1887) the railroad company had become hopelessly insolvent and the property had been placed in the hands of the receiver, so that the contingency mentioned in the contract, which excused the railroad company from purchasing the property, had arisen and it was released from compliance with this part of the contract. * * * The oil company took the risk of the railroad company, being able to purchase the property at the time fixed in the contract, and, as we have seen by the contract, secured to itself ample indemnity and compensation for the risk it run."

THE CONTRACT UNLAWFUL.

We come now to consider the second proposition, which is that the contract was in fact an unlawful one in some of its features, and those features such as to vitiate the whole, while the decision of the court below correctly declared the respective rights of the parties to this litigation in view of that fact.

This line of argument is entirely distinct from that concluded above, and is unnecessary if the court accept the conclusion contended for therein. If, however, it should not accept that conclusion, then there is this:

The contract in question was unlawful, and therefore void *ab initio;* and for these reasons:

1. The railroad company agreed that it "will not haul cotton seed in bulk for any other person or corporation," not at any price, the court will observe.

2. It also agreed to "give all needed facilities and preference to the said oil company to enable it to control all cotton seed along the line of said railroad as it now is or as it may be while this contract is in force;" i. e., from the 6th of October, 1883, to the 1st of January, 1886 (extended to 1887).

Here, then, is a contract in which a railroad company, enjoying its franchise in consideration of public service, expressly agrees not to haul one of the most important commodities of its locality in bulk for any person other than the oil company, on any terms; and also enters into a formal and avowed conspiracy for the creation of a monopoly in that commodity. A plainer and more flagrant violation of its duty to the public would be hard to imagine; and its charter could have been revoked because of it. No wonder that the contract was withheld from record.

Cotten v. McKenzie, 57 Miss. 418.
Schofield v. R. R. Co., 43 Ohio St. 571.
Handy et al. v. R. R. Co., 31 Fed. Rep. 689.

Counsel for the appellant himself admits that the first stipulation was unlawful. In his brief hereinbefore filed, on the motion to dismiss and affirm, and on page 15 thereof, he says: "The specific agreement not to haul seed in bulk for any other person or corporation, is certainly void."

In regard to the second stipulation, however, he takes a different position. He continues: "That to give all needed facilities and preferences to the oil company is not (void).

It must be held to mean only facilities and preferences authorized by law, under the rule that all inferences and presumptions, where possible, must be indulged in favor of and to support the legality of the several stipulations of a contract.

Chicago & Alton Ry. Co. v. Wiggins Ferry Co., 119 U. S. 616."

This position is not tenable in this connection.

In the first place the statement is altogether too strong. No such question was raised in the case cited; and nowhere is the rule expounded in the sweeping terms selected by counsel. The true rule is this: "Whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." Co. Lit. 42. Commenting on this rule, Mr. Metcalf, in his work on Contracts, p. 323, says: "This rule of favorable construction must, however, bend to the intention of the parties, the purpose of it being, like that of all other rules of construction, to give effect to such intention. If, therefore, the parties obviously meant to make a frivolous, absurd, or unlawful agreement, they must abide by the legal consequences."

In this case the intention of this stipulation is not left to be gathered by interpretation. It is expressed in the very stipulation itself. The railroad agrees to give all needed facilities and preference to the said oil company to "enable it to control all cotton seed along the line of said railroad," so that the very terms are to deny to the public the facilities for shipment to a fair and open market, which is the very *raison d'etre* of any railroad company's charter.

Again, the rule cannot be invoked by a party, and in respect to a contract, by whom and in which the law is

confessedly violated, and violated on the same line of offense. Counsel admits that in covenanting that the company would not ship in bulk for citizens on any terms, the law was violated; manifestly, therefore, no presumption of lawful intent can be claimed for other clauses in the same contract which directly further the same general policy. To indulge such a presumption under such circumstances would be a weakness which would verge upon the ridiculous. It would be to allow a criminal to plead guilty, and in the same breath to successfully invoke the presumption of innocence.

But what matters it, after all, whether this particular clause be unlawful or not? Counsel admits that the other clause is unlawful, and that fact avoids the whole contract. A contract made void by one unlawful agreement is just as void as if there were a dozen.

But the appellant says that, "Conceding they were both illegal, the contract will stand notwithstanding, with their expurgation. They are separable and independent of all other stipulations." Now that is just what we contend they are not. The contract embodies a single and connected scheme; its various stipulations are inter-dependent, as is shown by the analysis previously made. Further, and to enforce this point, mark this clause: "And said railroad company further agrees to use and operate said property upon the line of its railroad, and to turn the same over, should it at any time violate its agreement, upon the demand of said oil company." Obviously the "agreement," the violation of which was to entail on the railroad this liability to turn over, was the whole agreement made; the document as a whole. If, therefore, a single car-load of bulk seed were hauled for any one other than the oil company, for any purpose, at any price; if in any particular the railroad should fail so to prefer the oil company over any and all persons whomsoever, so far as might be necessary to create a monopoly in seed for the oil com-

pany—then could all of the rolling-stock be demanded, and the running of the road practically stopped. Bank v. Stegall, 41 Miss. 142. Again, and for the same purpose, note this other clause: "Said railroad company shall have the right at any time before said 1st of January, 1886, to purchase the whole of said property by paying the cash price thereof to said oil company, and in the event it does so the contract of rental hereinbefore set out shall immediately cease and determine, but such purchase shall not have the effect of anywise impairing this contract so far as its other terms are concerned." Thus these unlawful stipulations were expressly retained in operation until January, 1886, even in the event the road should find itself able to purchase prior to that day, and do so. The monoply in both forms was to be continued in any event.

But these considerations are not all. Those unlawful stipulations are a part of the *consideration* for this contract; and while there is much talk in the books about severing the stipulations of a contract sometimes, and executing those that are lawful without reference to those that are unlawful where it is practicable, the rule is directly reversed where part of a consideration is unlawful. The consideration is a whole, and is never treated as severable if any part be illegal as to the public.

Am. and Engl. Encyclopedia of Law, Vol. 3, page 887, note 2, and cases therein cited.

That these agreements are the consideration is clear. In the case of contracts executory on both sides, the mutual stipulations are also mutual considerations; it is *do ut des*. This is well shown in Metcalf on Contracts, p. 250-252:

"According to Chitty, whose description of a simple contract has been repeatedly cited, the consideration must be sufficient and legal and the agreement must be 'to perform some legal act, or omit to do anything, the performance whereof is not enjoined by law; that is, the consideration must be lawful, and the thing to be done or omitted must also be lawful, or the agreement is void. It is not only useless but difficult to illustrate these two

points separately, by examples. To every agreement there are in fact two considerations. This is manifest in the case of mutual promises executory, as in the case, for example, of Gibbons v. Prewd, Hardr. 102. The plaintiff promised to convey to the defendant all his interest in the estate of a person deceased, before a certain day, and the defendant promised to pay the plaintiff £25 before the same day. The consideration of the plaintiff's promise was the promise of the defendant, and *vice versa*. Had the promise of either been to do an unlawful act, the contract, that is, the promise of each, would have been void. * * * Contracts are said to be illegal, either because the consideration of a promise is illegal, or because the promise is illegal. The distinction is without a difference. At least there is no difference, in effect between the two. Wherever the illegality lies, the contract cannot be supported in a court of law. And it will be found, it is believed, that the phrase 'void for illegal consideration' is usually adopted only in those cases where the party, from whom an illegal consideration moved, sues for the breach of a promise which is not in itself illegal; as if an officer sues on a promise of indemnity, in itself an unexceptionable promise, the consideration of which was his permitting an escape, an unlawful act. If the other party sue the officer for not permitting the prisoner to go at large, according to agreement, the language would be that the *contract* was illegal; for the consideration of the contract on the part of the party suing, and from whom it moved, was not illegal.

"This difference of language, that is, sometimes saying the promise is void for illegal consideration, and sometimes that the contract is void because it is illegal, tends to confuse, and may leave the impression that the party to a contract, who stipulates for nothing unlawful on his part, may enforce his claim against the other party, though the other party, on whom the illegality rests, cannot enforce the contract against him. The law is not so. The whole contract is void (to speak with technical precision) whenever the consideration on either side is unlawful; that is, whether that which is the ground of the promise on one part, or the thing which is promised to be done on the other part, is unlawful, all is void, and neither party can derive any assistance from a court of law or of equity to carry it into effect." See 1 Powell on Contracts, 176.

So also Smith on Contracts, marginal page 20:

"Even if there were several considerations, and any one of them was illegal, it avoids the whole instrument; for it is impossible to say how much or how little weight the illegal portion may have had in inducing the execution of the entire contract." "Where covenants illegal as against public policy enter into and form a part of the entire consideration of a contract and both parties are in fault, the contract is wholly void. A separation of the good consideration from that which is illegal will be attempted in those cases only in which the party seeking to enforce the contract is not the wrong-doer. Saratoga County Bank v. King, 44 N. Y. 87;" Note 1 *Ib.*

So, in Brown's Commentaries, 4th edit., p. 357, we read:

"It is sufficiently obvious that a contract may be illegal *quoad* the consideration or *quoad* the promise. A distinction, however, here requires notice; a consideration bad in part is bad altogether; whereas, a promise may be to do several distinct and independent acts, of which some are legal and some are illegal," etc.

It seems to be unnecessary to enlarge on the flagitious character of this contract. "It stinketh to heaven." In the *brief* heretofore filed on the motion to dismiss, an effort is made to avoid the iniquity by asserting (see page 17) that "The oil company avers that it has always disavowed any desire to seek performance or enforcement of any such privileges" (implying thereby, of course, that such averment is true). * * * "The contract was, therefore, purged of any illegality by the conduct of the oil company under it in refusing to accept any illegal benefits," etc. * * * "The objectionable features were manifestly engrafted on their contract without the procurement of the oil company," etc. Now these statements of the brief are wholly unwarranted by the record. It is true that the oil company, in its answer to the receiver's cross-petition (not elsewhere) and after it had herein been assailed on these points, does make such an assertion of a disavowal (Transcript, p. 26); but that disavowal is nothing but the irresponsible statement of a pleading, made *post litem motam*, signed by counsel, but not sworn to, and not even under the corporate seal. On the other hand the record does show that on the 1st day of January, 1886, two-and-a-quarter years after the execution of the contract in question, by the agreement of extension, the oil company expressly and pointedly stipulated "that said contract *and all the provisions thereof*" should be extended until January 1, 1887. Also, in the oil company's original petition, filed *before* these points were made against it, the prayer is also express and pointed that "this honorable court may direct said receiver to continue in force and observe the terms of said Exhibit 'A' contract and agreement unbroken until such time as the court may name," etc. If human language means anything this is a prayer that all of the stipulations of the contract may be enforced. Also, the oil company took three depositions in this cause, those of Lyon, Fargason and Littlejohn, and in not one of them is one word said about these matters. So that it is demon-

strable that all the assertions of the brief on these points are without any support in the evidence, or by even sworn pleadings. Not only that, they are affirmatively disproven as shown above.

The contract being void, how, then, do the rights of the parties stand?

1. The attempt of the oil company to maintain a proceeding in the nature of a bill for a specific performance of the contract as it claims the contract to be, will, of course, fail. There was no lawful contract of any sort.

2. The freights earned by the railroad company cannot, of course, be retained by the oil company. Why should it not pay over the freights to the receiver? It will say, for two reasons: first, because part of it must go to pay the hire for the rolling-stock; and secondly, because the balance must go to pay the purchase-money of the same.

We answer, first as to the rents. It is manifest (the contract produced being unlawful and void) that the rents therein stipulated cannot be asserted. If the oil company is entitled to any allowance whatever for rents it must be on a *quantum valebat*, from an obligation implied by law out of the use of the rolling-stock by the railroad company. Even that, under the circumstances, is more than doubtful. But all this is of no moment. The rents were allowed to the utmost of the oil company's demand, and the appeal is not from that allowance. The balance left over after that allowance is the fund in controversy here. Nothing else.

We therefore answer, secondly, as to the purchase-money claim. The contract is unlawful and void *in toto*. The evidence wholly fails to disclose any contract of purchase, conditional or absolute, other than the one embodied in the void agreement of October, 1883. It is not even claimed that there was any other.

Nor can it be said that the contract by which the money came into the hands of the oil company being illegal and void, and the decree rendered against it being on a cross-petition, such decree was erroneous as disregarding the maxim: *in pari delicto potior conditio est defendentis.*

Even were the litigation between the two companies, the parties to that unlawful contract, and were the two companies in equal fault, i. e., *in pari delicto*, the position would be untenable—

1. Because the demand for freights earned need not be made out through the illegal contract.

Wooten v. Miller, 7 S. & M. 380.
Gilliam v. Brown, 43 Miss. 641.
Holt v. Barton, 42 Miss. 711.

2. Because, even if the freights had been earned through the illegal contract, yet the illegal transaction is over and complete, and the party in possession will not be then allowed to set up the defense, even as against the other.

Gilliam v. Brown, 43 Miss. 641.
Walker v. Jeffress, 45 Miss. 160.
Gary v. Jacobson, 55 Miss. 204, 207.

Again: even were the litigation between the two contracting companies, that maxim would not apply, and for the reason that the case is not disclosed of parties *in pari delicto*. They were both *in delicto*, but not *in pari delicto*. The distress of the railroad company, and its dependence on the oil company, is plain; and a more extortionate trade was never driven.

O'Connor v. Ward, 60 Miss. 1025.

One other point, in conclusion: On p. 18 of the brief filed by appellant on the motion to dismiss, the sum of $8268.56, alleged to have been laid out for operating expenses, is offered as an equitable set-off to the demand of the appellee.

To this there are two distinct answers, either good; first, that question was not presented by the pleadings in the cause, but appears for the first time in the brief of counsel, which of course cannot be allowed; secondly, the $8268.56 of so-called operating expenses is nothing but the money paid by J. T. Fargason & Co. on account of the purchase of the locomotive "Yazoo," as per the original contract. This whole matter was provided for in that contract, and in pursuance of the agreement (which has been executed) the property has been turned over to sellers, and in the accounting, from which this appeal was taken, they asked and were allowed rents therefor. They cannot take back the property, get rents, and collect the purchase money in full, all at once.

We respectfully submit that the decree of the court below should be affirmed.

HOLMES CUMMINS,
EDWARD MAYES,
Att'ys for Appellee.

THE SUNFLOWER OIL COMPANY—APPELLANT,

vs. } No. 123.

BENJAMIN WILSON, *Receiver of the Mobile and Northwestern Railway Company*—APPELLEE.

BRIEF AND ARGUMENT.

In the outset of this argument, we will call the attention of the court to this fact: That if the court should determine to affirm the decision of the court below in the case numbered 122, that will, of itself, dispose of this case in the same way. All of the reasons, all of the argument and brief, for the affirmance of that case, apply with equal force to this. It seems plain enough that if the oil company is not entitled under the contract set up by it to retain the surplus of freights payable to the railroad over rents payable by it, as against the receiver and for the time prior to his appointment, it cannot be entitled to retain the surplus as against him for the time subsequent to that appointment.

In order to save tedious repetition, therefore, on this branch of the litigation, we refer to and adopt the brief and argument on the other branch, herewith printed.

If, however, it should happen that the court declines to accept the views presented by us on that other branch, and determine to reverse the same, it still does not follow that this branch should be reversed also. Out of abundance of caution, and that we may fully discharge our duty to appellee, we shall guard against that contingency.

This branch is a stronger one for the appellee, for the reason that there is in this the additional question of the

rights of the mortgage creditors, and of the receiver in respect to the earnings after the institution of foreclosure proceedings and where the mortgage calls for income.

The court will remember that the bill of foreclosure was filed 15th Nov., 1886 (Transcript, pp. 1, 8,); and that the bill showed that the mortgage covered tolls and profits (Ib., p. 3); that the receiver was appointed Dec. 15, 1886, with the usual powers (Ib., p. 9, 10), and on the same day was authorized to continue the existing contract for the use of the rolling-stock (Ib., 11); while, on Jan. 3, 1887, he was authorized to make changes therein (Ib., 11, 12), the time of extension under the original and extended contracts having expired on the 1st (Ib., 18); and that the receiver continued to use said rolling-stock, with the assent of the oil company, thereafter, under a modified arrangement (Ib., 44, Ans. 11); and that the accounting from which this appeal was taken covered only the dealings between the receiver and the oil company (Ib., p. 83).

Appellant does not contend that its contracts with said railroad company ante-dated the mortgage, for foreclosure of which the bill was filed; nor that by its contracts it secured any lien on any property other than said engines and cars; nor that said contracts constituted a mortgage on the earnings of the road (or other charge thereon), prior to the mortgage set up in the bill, else further allegations to meet that view would have been necessary in the petition: nor does it question that the mortgage herein set up included tolls and profits. In fact the appellant's record should have included the mortgage as an exhibit to the bill; from which it would have been seen that all rents, tolls, incomes, profits, etc., were covered by that conveyance.

The reserved and additional question on this branch of the case, then, is whether the oil company is entitled to retain the *receiver's* earnings in order to credit them on the railroad company's pretended obligation for the purchase-money of said rolling-stock.

In the first place, it must be observed that the appellant occupies, as to these freights, only the attitude of a general creditor. Whatever might have been its rights in respect to freights earned from it *prior* to the 1st of January, 1887, as under the original contract of 1883 and the extension of 1886; granting, for the argument, that it had a specific claim against them, under those contracts, and a right to impound them and apply them on account of purchase-money,—yet it is clear that it had no such right as to such freights *after* the 1st of January, 1887, and for the reason that on that day the contract under which it claimed such special right, *expired by its very terms.* After that, the oil company's sole right was either to take back the rolling-stock, or else look to the railroad's general responsibility.

We cannot strongly enough impress upon the court the fact that counsel for the appellant, in their argument to the effect of a "pledge" of these earnings, overlook the vital fact that, granting to the written contracts all they claim of legal efficacy, yet they never even professed to pledge any earnings beyond the 1st of January, 1877.

The case comes clearly within the rules laid down in Fasdick v. Schall, 99 U. S. 235. There, in a case similar to this, the court says: "*The cars were not included in what was sold at the foreclosure sale, and, consequently, have contributed nothing directly to the fund now in court for distribution*" (just as here). "*So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt*" (just as here; and, moreover, it is not even shown here that the current expenses of the receiver in earning these very freights can be discharged without their use); "*and, if there did, through the rental already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars*" (just as here). *There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights*" (and yet,

it was shown, as here, that there was an unpaid balance of purchase-money for cars). "*In short, as the case stands, no equitable claim whatever has been established upon the fund in court, prima facie that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome.* Schall, for the balance, his due, after his own security has been *exhausted* (the cars had been returned, just as here), *occupies the position of a general creditor only.*" See also, Huidekoper v. Hinckley Locomotive Works, 99 U. S. 258.

It is true that in those cases the fund in court was the proceeds of the mortgage sale; while here it is not, but is the receiver's earnings. But the distinction is without a difference in this respect. The receiver's net earnings represent the income mortgaged, and are as much the mortgagee's, *as against a general creditor*, as are the proceeds of sale.

High on Receivers, sec. 643, 644.
Jones on Mortgages, sec, 1536.
Bridge Co. v. Heidelbach, 94 U. S. 798.
Gilman v. Telegraph Co., 91 U. S. 603.
Carrigan v. Trenton Falls Co., 3 Halst. Ch. 498.
Fish v. Potts, 4 Halst. Ch. 277–909.
Post v. Dorr, 4 Edw. Ch., 412.

The case of Hale v. Frost, 99 U. S. 389, does not militate against these views. In that case it was a question of the appropriation of the receiver's *net* earnings to an antecedent debt, while here the appellant has not shown or alleged that there are any net earnings; moreover, in that case the debt was for supplies consumed in the railroad business, while here the property was returned to the appellant, as his contract was, with the privilege of proving any injury thereto by use, and getting an allowance therefor.

Nor does the case of Miltenberger v. Logansport &c. R. R. Co., 106 U. S. 286, cited by appellant, oppose the view we contend for. There the court says: "It cannot be affirmed that no items which accrued before the appoint-

ment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. *The payment of such debts stands, prima facie, on a diffecent basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances.*" The burden, therefore, of overcoming this "*prima facie*" objection, and of showing the "special circumstances," is on the claimant. But here, there is no such showing. In fact, the receiver alleges in his answer and cross-petition, and that averment is admitted to be true in the answer of appellant, that it would be unjust to the other parties interested to compel the receiver to purchase the rolling stock in question at $17,600, since he could duplicate it at $4,000 or less. See record, p. 23-24. The clear and simple fact is, that the depreciation in the market of this narrow-gauge rolling stock causes the appellant to be unwilling to stand by the security itself selected. That is the whole point.

Appellant also relies on Burnham v. Bowen, 111 U. S., 776. That, again, was a case in which the property was consumed in the use of it, being coal. A very different case from this, where the creditor carved out his own security in the shape of a retained title, and has received back the property in exact conformity to the stipulation he himself exacted.

Nor does the case of Union Trust Company v. Illinois Midland Railway Company, 117 U. S. 434, also cited by appellant, hold any different view. Indeed, the court there rejected a claim for preference in respect of a